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MISSISSIPPI LAW JOURNAL

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THE REFORMATION OF WRITINGS UNDER THE LAW OF MISSISSIPPI

WEX S. MALONE* AND THOMAS M. KEESEE**

1. GENERAL PROVINCE AND SUBJECT MATTER OF RELIEF

The function of reforming writings for mistake of the parties is a portion of the broad jurisdiction of equity to relieve against unconscionable bargains.[1] Reformation can never be employed to create a new bargain. Its operation is limited strictly to those cases where the contractors have reached an agreement which they attempt to reduce to written form. By mistake they create a document which either does not express their wishes at all or expresses them only imperfectly. In such cases the inquiry of the court is always whether the parties made the agreement contained in the instrument sought to be reformed, or, on the other hand, whether they made a different bargain from that exhibited in the writing. Only in the latter instance can the court interpose as a corrector of their handiwork. The chancellor can not inquire into the wisdom or folly of the bargain nor into the errors which prompted the transaction. Hence he must always be on the alert to distinguish the real bargain from the complainant's contention as to what he *would* have done, what he *thought* he did or what he *intended* to do. All men are apt to make foolish contracts when motivated by surprise, ignorance, mistake or fraud. Likewise they are prone to make their real wishes only imperfectly understood. But none of the unfortunate consequences of these situations can find their remedy in the power of reformation. If the writing the parties executed conforms with the agreement entered into by them the court is powerless to remake their transaction.

*Professor of Law, University of Mississippi.

**Third Year Law Student, University of Mississippi.

[1] "Equity jurisdiction to reform and remodel a written contract, so as to conform to the parol or verbal agreement of the parties cannot, at this day, be controverted. If by fraud, accident or mistake, the writing speak a language, or contain stipulations variant from that to which the parties assented, equity will remodel the writing so as to make it agree with the actual contract." Norton v. Coley, 45 Miss. 125, 127 (1871). Reformation of instruments is exclusively within the jurisdiction of the chancery court. Wright v. Lott, 155 Miss. 185, 124 So. 270 (1929). But see Gray v. Roden, 24 Miss. 667 (1852).

Any writing, whether executed or executory, involving legal relations is proper subject matter for reformation.[2] Thus equity will reform deeds so as to correct a misdescription or other inaccuracy.[3] Likewise it will equally correct deeds of trust,[4] promissory notes,[5] treasurers' bonds,[6] contractors' bonds,[7] insurance policies,[8] or bills of sale of personal property.[9] In fact, any instrument that constitutes an attempted reduction to writing of a mutual agreement may be reformed under proper circumstances. The only limitation in this respect is that the writing sought to be corrected must be the written embodiment of a voluntary contractual act. Thus, equity is empowered to reform a trustee's deed so as to make it conform with the deed of trust under which it was executed. This is unaffected by the fact that the maker of the deed of trust had no hand in the foreclosure proceedings.[10] In such case the deed is no more than the final consummation of a transaction entered into by the mortgagor under terms to which he voluntarily assented.

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[2]"And it (the power to reform) is a power which is not confined to any description of contracts; it extends to executed as well as executory contracts, however solemn they may be in their character." Simmons v. North et al., 11 Miss. 67, 71 (1844).

[3]Becker v. Dunagin, 113 Miss. 338, 74 So. 275 (1917); McAllister v. Richardson, 103 Miss. 418, 60 So. 570 (1912); Morrison v. Hardin, 81 Miss. 583, 33 So. 80 (1902); Mosby et al. v. Wall et al., 23 Miss. 81, 55 Am. Dec. 71 (1851) (title bond); Peques v. Mosby, 7 S. & M. (15 Miss.) 340 (1846).

[4]Standard Lumber & Mfg. Co. et al. v. Deposit Guaranty Bank & Trust Co., 169 Miss. 120, 152 So. 639 (1934); Gates v. Naval Stores Co., 92 Miss. 227, 45 So. 979 (1908); Brinson v. Berry, 7 So. 322 (1890); Foute v. Fairman et al., 48 Miss. 536 (1873); Norton v. Coley, 45 Miss. 125 (1871); Simmons v. North et al., 11 Miss. 67 (1844).

[5]In Gray v. Roden, 24 Miss. 667 (1852), a promissory note was reformed so as to state the true amount promised to be paid.

[6]In Hall v. Lafayette County, 69 Miss. 529, 13 So. 38 (1891), a treasurer's bond originally providing protection only against defalcation from the general fund was reformed so as to include protection for school funds.

[7]In U. S. Fidelity & Guaranty Co. v. Parsons, 147 Miss. 335, 112 So. 469 (1927), a contractor's bond was reformed by a change in the name of the beneficiary and the date of the contract whose performance was guaranteed by the bond.

[8]In Phoenix Insurance Co. v. Hoffheimer, 48 Miss. 536 (1873), a fire insurance policy which was intended to name X, "as agent" for plaintiff, beneficiary, was reformed for the mistaken designation of X as beneficiary. See St. Paul Fire & Marine Ins. Co. v. McQuaid, 114 Miss. 430, 75 So. 255 (1917), as to reformation of fire insurance policy by changing the beneficiary. For other cases involving reformation of insurance policies, see: Aetna Ins. Co. v. Sims, 166 So. 759 (Miss. 1936); Cox v. Hartford Fire Ins. Co. et al., 172 Miss. 841, 160 So. 741 (1935); Fire and Marine Ins. Co. v. Loving, 163 Miss. 114, 140 So. 727 (1932); Agricultural Ins. Co. v. Anderson, 120 Miss. 278, 82 So. 146 (1919); Planters' Ins. Co. v. Myers, 55 Miss. 479 (1877).

[9]See Rogers v. Clayton, 149 Miss. 47, 115 So. 106 (1928).

[10]Jones v. Levy, 92 Miss. 551, 46 So. 825 (1908); Gates v. Naval Stores Co., *supra*, Note 4.

A more difficult problem is presented where the writing sought to be corrected was executed by some official acting solely under power vested in him by law. In this class are deeds of sheriffs, tax commissioners, and commissioners acting pursuant to court orders. Since these officers always convey to some voluntary purchaser and both parties may have intended a conveyance other than the one actually executed, there is, in one sense of the word at least, a contractual background to serve as the basis for reformation. The real problem is one of absence of authority in the officer to make a deed other than the one actually executed by him. He is selling the land of another without the latter's consent. Hence he must act strictly within his official power. In this respect there should be no unusual obstacle to the reformation of a sheriff's deed. He usually has a general power to levy on all property of the judgment debtor situated within his jurisdiction. Hence it appears that reformation of such a deed is allowable in Mississippi.[11] On the other hand, a deed of a tax commissioner is valid only in so far as it conforms to an assessment theretofore made. Hence, if the assessment erroneously describes the premises and this error is perpetuated in the tax deed, such can not be corrected without a resulting absence of conformity between the deed and the assessment upon which its validity depends. The result of reformation would be a deed beyond the power of the grantor. For this reason the deed of a tax commissioner which perpetuates an error in the assessment can not be reformed.[12] Nor can the assessment be corrected. In such case there is a complete absence of any contractual background to which the assessment might be referred for comparison. The assessment proceeding is wholly *in invitum,* emanating entirely from the assessing official. It is neither encouraged nor assented to by the owner of the property assessed.[13] For the same reasons already noted the court can not reform a deed of a special commissioner made pursuant to a court order in a petition proceeding.[14] If the deed follows

[11]See Wise et al. v. Brooks, 69 Miss. 891, 895, 13 So. 836, 837 (1892).

[12]See Boone v. Dulion, 80 Miss. 584, 32 So. 1 (1902); Cogburn v. Hunt, 56 Miss. 718 (1879); Bowers v. Andrews et al., 52 Miss. 596 (1876).

[13]". . . it is well settled that there is no element of contract, agreement, or consent in the imposition or collection of taxes . . . the whole proceeding is *in invitum* as to the tax-payer . . . the latter (the tax-payer) stands passive, consenting to nothing, and demanding that the officers of the law shall show their authority for every step taken by them. . . . Unless, therefore, there is some provision of statute law upon which the relief prayed (reformation of tax deed) can be granted, it is inadmissible under the general principles underlying the law relative to taxation." Cogburn v. Hunt, 56 Miss. 718, 723 (1879).

[14]See Wells v. Ellabee, 93 Miss. 268, 46 So. 479 (1908), where it was sought to reform a commissioner's deed and the chancery court proceedings under which the sale was made.

the terms of the order the effect of reformation would be to create an instrument which the commissioner was originally without power to execute.[15]

2. REFORMATION AND MISTAKE

As we have seen heretofore, the extent of the power of reformation is limited to the correction of a writing solely for the purpose of making it conform to the real wishes of the parties. Hence we must presuppose that the parties have reached a prior understanding concerning the term or terms later alleged to be erroneous in the writing, and further, that they made an attempt to execute their document. Hence the broad transaction with which the court is concerned involves two stages, either of which may be affected by error or misunderstanding. In the first place, one of the parties may have been induced or persuaded to enter into the original transaction by reason of some mistaken assumption under which he labored at the time. This type of misapprehension on his part may be aptly termed a *mistake in the inducement.* Here he intended to make the precise bargain he made. There is no misunderstanding as to the thing agreed to. His complaint is of a different sort. It is rather that had he known the truth at the time he would have had a different intention. He would have insisted on the omission of some provision in the agreement, or would have demanded an additional clause for his protection. To illustrate: *A* gives a warranty deed of Blackacre to *B*. Had he known of an existing encumbrance on the land, he would have insisted that it be excepted from the warranty. It is equally possible that *B* may or may not have participated in *A's* mistake. Or, had *B* known the truth, he may or may not have realized that the mistake was a prominent inducing factor in *A's* conduct. Furthermore, even though we may easily believe that if *A* had known of the encumbrance he would have insisted on protection in the deed, yet we can not conclude with equal ease that *B* would have accepted such a provision. For this reason, when an agreement has been reached and has been accurately transcribed in the writing equity can not reform the same even though one or both the parties may have labored under a serious misapprehension as

[15]The reformation of judgments and court orders is beyond the scope of the present article.

to its consequences.[16] It is only when the error is found in the second stage of the transaction, that is to say, in the attempt to reduce to black and white what has already been agreed to, that equity may intervene and correct the mistake. We can hardly overemphasize the importance of distinguishing between the two types of error. Failure to do so has been the root of much difficulty in the field of reformation.

The above distinction, although clear in theory, nevertheless presents a most difficult problem in practical administration. Each litigant enters the court room with his own version of the transaction. His statements are colored by his appreciation of the intervening difficulties and his imperfect understanding of the elusive and shifting terms of the preliminary negotiations. It is not unlikely that the parties formulated the general purpose they wished to carry out and determined vaguely the manner in which this should be done. The details either may not have been considered or may have been altered from time to time. During this period they were probably looking only towards the success of their venture, and one or both may have been wholly indifferent to many of the terms. Similarly it is possible that one party may have forgotten to call the attention of the other to his wishes. Thus it is apparent that in most contracts there exists a mass of latent conflicts and ambiguities which reach fruition only when the parties finally discover that their interests are antagonistic.

The facts of a recent Mississippi case serve admirably to illustrate the distinction between a mistake which induces or persuades a party to enter into a contractual relationship and one which takes place in the attempt to reduce a bargain to written form.[17] *A* was indebted on indorsements to several banks and, finding himself financially embarrassed, determined to execute a mortgage on the only piece of real property owned by him for the purpose of securing equally *all* his creditors. Among these was the plaintiff bank. *A*'s original intention was that the plaintiff should be secured ratably with his other creditors. However, he changed this intention on being erroneously informed that the plaintiff would be otherwise secured. As a result the plaintiff was excluded from the protection of the deed. *A* died shortly thereafter, leaving no assets available for the satisfaction of the plaintiff's claim, whereupon the latter instituted a suit against *A*'s administrator and the grantees in the deed for the

[16] "It is not what the parties would have intended if they had known better, but what did they intend at the time, informed as they were." Wise et al. v. Brooks, 69 Miss. 891, 895, 13 So. 836, 837 (1892).

[17] Whitney Cent. Nat. Bank v. First Nat. Bank, 158 Miss. 93, 130 So. 99 (1930).

purpose of having the deed reformed. His contention was that *A* intended to secure all his creditors equally, but because of a mistake did not carry this purpose into execution. However, the court rightfully refused to correct the deed. The grantor's original intention to secure all his creditors equally in the deed was abandoned. He was induced by mistake to formulate a new purpose which excluded the plaintiff. The deed accurately expressed the intention of the grantor at the time he drafted it. Nor is it enough that *A* would probably have reverted to his original wish if he had known the truth. The language of Griffith, J., is appropriate:

> "What did the mortgagor intend to do at the time, informed as he was, not what would he have done, or have intended to do, had he been differently informed, or known better? To push the doctrine of mistake beyond the limits thus stated would be to involve business transactions in an unendurable uncertainty, for it is no less than an obvious fact that many, very many, of our executed contracts express intentions, which have been formed out of a succession of mistaken considerations. And if the door is opened, where in the order of succession is it to be closed . . ."[18]

There are further complications. The mistake *in the inducement* may be one which, as heretofore seen, is present in the mind of one or both parties when the original agreement is entered into. On the other hand, the parties may have struck their bargain without error, and yet are induced by some mistaken consideration to adopt an ineffective form of expression in translating their wishes into writing. As we have already indicated, a mistake which induces a party to arrive at the purpose of his transaction can never alone give rise to a suit for reformation. On the other hand, if the parties to a bargain have clearly and unequivocally determined what they wish to do, and yet upon attempting to reduce their wishes to writing are misled by their imperfect understanding to adopt written terms which do not carry those wishes into execution, every prerequisite to reformation is present. The choice of terms is a mere step in the reduction of the bargain to writing. Hence any mistake occurring at this stage is within the province of reformation. This is true even though the terms mistakenly adopted do not differ from those which appear in the executed writing. Although there is an apparent conformity between the terms of the bargain and those found in the writing, yet this is no more than a mere superficial accord of form with form. The real bargain of the contractors

[18] *Id.* at 98, 130 So. at 100.

failed to find an accurate expression in their written memorandum.

Several cases have arisen in Mississippi requiring the court to distinguish a mistake inducing the transaction from one inducing the particular expression selected to carry the purpose of the transaction into execution. One of these involved a misdescription in a deed.[19] The owner of two adjoining lots, ten and twelve, had erected a dwelling on Lot Ten, but had placed his driveway twenty feet eastward of the boundary line on Lot Twelve. He conveyed both lots to the plaintiff and *X* as tenants in common. Both grantees believed that the driveway constituted the boundary line between the two parcels. Finally *X* offered to purchase plaintiff's interest in that portion of the premises east of the driveway. Laboring under the misapprehension referred to, they drafted a deed describing the premises purchased as Lot Twelve. The same error was perpetrated when plaintiff later purchased *X*'s interest in Lot Ten. The result was that plaintiff failed to receive all the land bargained for, while *X* received twenty feet more than was contemplated in the bargain. The same error continued in a subsequent grant of Lot Twelve by *X* to defendant. The evidence relating to this latter conveyance established that the premises were pointed out to defendant who purchased on this basis. Later plaintiff discovered the errors and sought reformation of all three deeds to enable him to gain the legal title to all land formerly owned by him and *X* west of the driveway. Relief was allowed. The defendant's contention that all parties intended to buy and sell lots ten and twelve respectively did not prevail.

> "It is not what description the parties intended to write but what property the parties intended to have embraced in the description they used. To hold that a court of equity could not correct mistakes for the reason alone that the parties used the terms they intended to use would be to curtail its powers to a hitherto unheard extent. . . ."[20]

A case involving almost identical facts and in which the court reached the same conclusion is *Birchett vs. Anderson*.[21]

In the cases above, the court's task was rendered easier by the

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[19]Brimm v. McGee, 119 Miss. 52, 80 So. 379 (1918).

[20]*Id.* at 57, 80 So. at 381.

[21]160 Miss. 144, 133 So. 129 (1931). In Miles v. Miles, 84 Miss. 624, 37 So. 112 (1904), *A* in settlement of his estate, conveyed a plantation to his son by a deed, describing the plantation by name and also by metes and bounds. The latter description, through mistake, did not contain all of the land generally accepted as part of the plantation. Later, the land omitted was devised by will to *A*'s wife. In an action brought by the son against the wife, reformation of his deed was allowed so as to include the omitted portion.

established fact that the premises contemplated by the parties were at all times during the negotiations specifically pointed out as between themselves. The problem is more complex when the parties are motivated to choose an erroneous expression by reason of their ignorance of the law. However, the inquiry is primarily the same as where the mistake is one of fact. The mere fact that the mistake involved is one of law presents no insuperable obstacle to reformation.[22] This is illustrated by the case of *Hall vs. Lafayette County.*[23] The treasurer of Lafayette County was required by law to give two bonds: first, for the safeguarding of money held by him in the general county fund, second, a separate bond for the protection of school money in his hands. *X,* a treasurer-elect, proposed to defendants, who were stockholders in a local bank, that they should furnish him with sufficient bond to enable him to be legally inducted into office. In return he agreed that all money coming under his control should be deposited with their bank. Defendants agreed to this. However, they so drafted the bond as to make it afford protection only for money designated as being in the general fund. In doing so they were motivated by the mistaken belief that this was the only fund for which the law required protection. Subsequently there was a defalcation from the school fund. Following an unsuccessful suit on the bond as executed, the county sought to have the obligation so reformed as to include within the scope of its protection school money in the treasurer's hands. Relief was granted notwithstanding the defendants' protest that they intended to execute the exact bond signed by them. The court declared that the broad wish of the signers was to guarantee all funds required by law to be protected in order to enable the treasurer legally to assume the duties of his office. Hence school funds were within the scope of their original agreement.

A similar situation arose in *Canning Company vs. Orr.*[24] A grantor intended to convey to the complainant all rights to gather

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[22]An often asserted objection to reformation for mistake of law is the maxim, *ignorantia legis non excusat.* The Mississippi court in Sparks v. Pittman, 51 Miss. 511, 520 (1875), in disposing of this objection to the reformation of a deed, said: "These and all other general doctrines and aphorisms, when properly applied to facts and in furtherance of justice, should be carefully regarded; but the danger is that they are often pressed into the service of injustice by a misapplication of their meaning. It is better to yield to the truth and conscience than to a reverence for maxims."

[23]69 Miss. 529, 13 So. 38 (1891).

[24]88 Miss. 771, 41 So. 378 (1906). Compare with this case and Hall v. Lafayette County, 69 Miss. 529, 13 So. 38 (1891), the case of Ingram Day Lumber Co. v. Robertson, 129 Mill. 365, 92 So. 289 (1922); but see dissenting opinion of Anderson, J., in Ingram Day Lumber Co. v. Robertson, *supra.*

and collect oysters in a portion of a bay over which he had control. Both parties mistakenly believed that a grant of the owner's "littoral and aquatic rights" would carry out this intention and were induced by this misapprehension to express their conveyance in such form. On discovering that this grant would not serve as a transfer of the oyster rights the complainant sought to have the deed corrected so as to convey the interest desired in appropriate legal form. The court reformed the writing despite the defendant's objections that the conveyance was in the form intended by both parties and that the mistake, if indeed any there were, was one of law.

There is a common judicial saying that equity will reform a writing only for a *mutual* mistake. However, if the error of which the petitioner complains occurred in reducing to writing a previously formed bargain, and was not a mere mistake inducing the transaction, it is difficult to understand how it could be other than mutual. If the bargain to which both parties have agreed is not accurately set forth in their written memorandum it must follow of necessity that the wishes of both have been frustrated. Nor can it matter that the mistake was made solely through the agency of one party or the other or even a third person.[25] A review of the decisions will indicate that the often asserted requirement of mutuality of mistake is seldom honored with more than a passing lip service. When relief is refused because of alleged noncompliance with this requirement the difficulty can always be traced to some other more subtle source. Although the Supreme Court of Mississippi has asserted by way of *dictum* on two occasions that it will not reform unless the mistake is mutual, it has not as yet resorted to the doctrine as a bar to relief.[26]

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[25]This subject is extensively treated in an article by the present writer, "Reformation of Writings for Mutual Mistake of Fact" (1936) 26 GEORGETOWN L. J. 613.

[26]"Equity courts may not make new contracts for parties, even though same may not have been the kind of contract they ought to have made, yet, if the language is plain and unambiguous, it must be shown beyond a reasonable doubt that a mutual mistake was made." Rogers v. Clayton, 149 Miss. 47, 55, 115 So. 106, 108 (1927). "The mistake that equity relieves against has reference to intention; it seeks to make the instrument speak the mutual intention. It does not undertake the threefold function of gathering the true facts for the parties, and, this done, to form for them an intention on the facts thus gathered, and thereupon to execute for them a contract which they did not make." Whitney Cent. Nat. Bank v. First Nat. Bank, 158 Miss. 93, 98, 130 So. 99, 100 (1930).

3. PARTIES TO REFORMATION PROCEEDINGS.[27]

Any party to a writing may have reformation. Nor is relief confined to the parties themselves. The heirs, devisees, or grantees of such persons may equally have access to the courts.[28] Likewise, reformation is available against those claiming under the other party who either are heirs or devisees,[29] volunteers,[30] or even purchasers for value who either participated in the original mistake[31] or who purchased with notice.[32] Only when the rights of a *bona fide* purchaser for value have intervened does the equity of reformation come to an end.[33] However, when a mistake has persisted through several successive conveyances all intervening holders or their legal representatives are necessary parties to a proceeding to correct the error.[34]

Difficulty has been encountered by the court in determining whether or not reformation should be allowed when the rights of a judgment creditor have intervened between the time when the writing was executed and the discovery of the mistake. On principle, a judgment creditor accedes only to the legal interest of the debtor, whatever that interest might be. Hence he is not a *bona fide* purchaser who takes by reason of an independent equity. In this respect there should be no serious obstacle to relief either against a judgment creditor or a purchaser at an execution sale; and this was the result reached in the earlier Mississippi cases.[35] However, in 1883 the Court for all practical purposes discarded the rule just seen.

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[27]As to right to reformation of contract or instrument as affected by intervening rights of third parties, see 44 A. L. R. 78.

[28]Russell v. Scarborough, 155 Miss. 508, 124 So. 648 (1929).

[29]Brinson v. Berry et al., 7 So. 322 (1890). See Simmons v. North et al., 11 Miss. 67, 73 (1844).

[30]Spencer v. Spencer, 115 Miss. 71, 75 So. 770 (1917); Miles v. Miles, 84 Miss. 624, 37 So. 112 (1904); Brinson v. Berry et al., *ibid.*; see Simmons v. North et al., *ibid.*

[31]Brimm v. McGee, 119 Miss. 52, 80 So. 379 (1918); Wise et al. v. Brooks, 69 Miss. 891, 13 So. 836 (1892); Dunbar et al. v. Newman, 46 Miss. 231 (1871). But compare Cole v. Fickett, 95 Me. 265, 49 Atl. 1066 (1901). See generally Simmons v. North et al., 11 Miss. 67 (1844).

[32]Lyon v. Carr et al., 151 Miss. 851, 119 So. 306 (1928); Dead River Hunting & Fishing Club v. Stovall, 147 Miss. 385, 113 So. 336 (1927).

[33]See cases cited supra note 32, and see 3 WILLISTON, CONTRACTS, § 1548.

[34]Wells v. Ellabee, 93 Miss. 268, 46 So. 479 (1908); Gates v. Naval Stores Co., 92 Miss. 227, 45 So. 979 (1908).

[35]"Courts of equity will interfere to correct mistakes between the original parties, or, those claiming under them in privity, as heirs, devisees, legatees, assignees, voluntary grantees or judgment creditors, or purchasers from them with notice of the fact." Simmons v. North et al., 11 Miss. 67, 73 (1844); Foute v. Fairman et al., 48 Miss. 536 (1873). But *cf.* Kilpatrick v. Kilpatrick, 23 Miss. 124, 55 Am. Dec. 79 (1851). In a later case the court went so far as to reform a deed executed in defraud of creditors where the property had reached the hands of a *bona fide* purchaser from the grantee. He was allowed to prevail over an intervening judgment creditor. Willis v. Gattman, 53 Miss. 721 (1876).

In the case of *Nugent vs. Priebatsch*[36] it was held that the Recording Act[37] was conclusive against the right to reformation where the interest of a judgment creditor had intervened. It was further held that this interest passed to the purchaser at execution sale. Such purchaser would prevail in an action to correct a prior conveyance of land acquired by him, not because he himself was a bona fide purchaser, but rather because he acceded to the rights of the judgment creditor. The conclusion reached in this case appears highly debatable both from the standpoint of legal accuracy and policy. Although all interests subject to record are void as against creditors and subsequent purchasers unless recorded, nevertheless it is universally admitted that interests in land arising solely by implication of law and hence impossible of record do not come within the purview of recording acts. Nor was this denied in the *Priebatsch case.*[38] The necessary implication, rather, was that an equity of reformation could not be deemed an unrecordable interest.[39]

Although it is true that the right to reform may arise in the same transaction in which the deed or other recordable interest is involved, yet, not only is the former a separate interest arising wholly by

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[36]61 Miss. 402 (1883).

[37]Miss. Code 1880, § 1212.

[38]"A purchaser under a judgment against the trustee of property in which there is a trust arising by implication of law does not acquire the right of a beneficiary because he is not a purchaser for value. Nor, since such trusts are not required to be recorded, is the creditor in the judgment entitled to subject the property by virtue of the registry act, but where the debtor has a beneficial interest in the property, and conveys it by absolute deed or mortgage, or makes a declaration of trust in the land, and the conveyance or mortgage or declaration of trust is not acknowledged or proved and recorded in the manner prescribed by law, it is void as to creditors, who, not having notice, have reduced their demands to judgment, and a purchaser under such judgment is protected, not because he is a *bona fide* purchaser, but because the conveyance or declaration of trust is void as against the creditor under whose judgment the land is sold." Nugent & Co. v. Priebatsch, 61 Miss. 402, 407 (1883).

[39]The overwhelming weight of authority is to the effect that reformation may be had despite the intervening rights of judgment creditors. See cases collected in a note, 44 A. L. R. 103. In the following cases the court expressly declared that the rule above stated is not affected by the provisions of Recording Acts: Ft. Smith Mill Co. v. Mickles, 61 Ark. 123, 32 S. W. 493 (1895); Burke v. Anderson, 40 Ga. 535 (1869); Strang v. Beach, 11 Ohio St. 283, 78 Am. Dec. 308 (1860); Bailey v. Timberlake, 74 Ala. 221 (1883). In the two following cases reformation was refused under similar circumstances. The courts, however, did not deny that an equity of reformation was an unrecordable interest, but placed their decision on the basis of negligence in making the error: Rutgers v. Kingsland, 7 N. J. Eq. 178 (1848); White v. Denman, 16 Ohio 60 (1847). The reasoning and justice of the case last cited was seriously questioned in Strang v. Beach, *supra*. Similarly relief was refused in the case of Ruppert v. Haske, 5 Mackey (D. C.) 262 (1886). However, in this case it clearly appears from the language of the court that all interests, whether recordable or unrecordable, are expressly within the provisions of the recording act of the District.

implication of law, but is, in fact, *opposed* to the deed or other document subject to record. It was readily admitted by the court that a constructive trust, as opposed to an express trust, is not subject to record. Yet the right to reformation differs only in name from a constructive trust. When there is a mistaken grant of less land than was intended by the parties, the court, by reforming the deed or other conveyance, does, in effect, make the grantor constructive trustee for the grantee as to the deficiency, and proceeds to execute the trust. The converse is true when there is a conveyance of *more* than the parties wished. Both the doctrine of constructive trusts and reformation are based on the general jurisdiction of equity to prevent unjust enrichment.[40] The equitable interest with which the complainant is vested in either event exists wholly within the ambit of the Chancellor's conscience. It is submitted that the right to reformation for fraud or mistake is much less accessible to record than a purchase money lien on land. In the former instance, the mistake giving rise to the complainant's interest likewise deprives him of an opportunity to record his real wishes in the matter. In the case of a purchase money lien, however, the vendor's interest is susceptible to record as an express mortgage in his favor. Yet it has been held that a purchase money lien, being an unrecordable interest, is not within the purview of the Recording Act.[41]

Reformation will not generally be allowed in favor of a volunteer who gave no consideration for the instrument complained of.[42] This is true whether relief is sought against the original grantor, a subsequent purchaser from him, or even a subsequent volunteer in whose favor the grantor altered his original intention.[43] However, when relief is sought by one volunteer against another the court will attempt to find some consideration for the original grant whenever possible. Thus, in one case reformation was allowed on behalf of a volunteer where he had entered upon the premises and expended money on their improvement when his action was against the heirs and devisees of the deceased grantor.[44] Likewise, when all parties deraign from a common source and take by a single deed of settlement, reformation may be had by any one voluntary grantee as

[40]It is probably for this reason that equity will not grant relief in favor of one who has given no consideration for the instrument sought to be corrected. See cases *infra*, notes 42 and 43.

[41]Lissa v. Posey, 64 Miss. 352, 1 So. 500 (1886).

[42]Herod v. Robinson, 149 Miss. 354, 115 So. 40 (1927); and see Spencer v. Spencer, 115 Miss. 71, 75 So. 770 (1917); McAllister v. Richardson, 103 Miss. 418, 60 So. 570 (1912); Miles v. Miles, 84 Miss. 624, 37 So. 112 (1904).

[43]Herod v. Robinson, 149 Miss. 354, 115 So. 40 (1927).

[44]Miles v. Miles, 84 Miss. 624, 640, 37 So. 112, 116 (1904).

against the others.[45] This was clearly pointed out in the leading case in this state dealing with reformation as between volunteers:

> "All parties deraign from a common source, and stand before the court in the same attitude as if they had inherited the property jointly, and then undertaken to amicably divide the same, and a mutual mistake had occurred in their deeds of partition."[46]

Where a grantor has made a gratuitous conveyance containing a mistake and has died without realizing the error it would appear that reformation should be allowed against an heir of his who takes by operation of law, or even a residuary legatee. In such case the right to recover should not be made to depend on the existence of a common settlement. Unless there is something to indicate that the original grantor realized his mistake and altered his intention in favor of another it would appear better to assume that he would have consented voluntarily to correction had he known of the mistake. Such was the rule established in a leading case[47] which has been quoted with approval by the Supreme Court of Mississippi.[48]

4. SPECIFIC REQUIREMENTS, DEFENSES TO RELIEF

The statement that Equity will not reform a writing except upon clear and convincing evidence is a commonplace in the law of reformation. This requirement has been variously stated by the courts: "the evidence must be clear beyond a doubt,"[49] "clear and satisfactory,"[50] must be of the "clearest,"[51] "not only by the preponderance of testimony, but practically to the exclusion of every other reasonable hypothesis,"[52] "proof clear and free from doubt,"[53] "must rise far above mere preponderance of evidence."[54] Likewise it has been

[45]Spencer v. Spencer, 115 Miss. 71, 75 So. 770 (1917); Miles v. Miles, 84 Miss. 624, 37 So. 112 (1904).

[46]Miles v. Miles, 84 Miss. 640, 37 So. 112, 115 (1904).

[47]McMechan v. Warburton, 1 Ir. R. 435 (1896).

[48]Spencer v. Spencer, 115 Miss. 71, 80, 75 So. 770, 771 (1917).

[49]"There is no doubt but courts of equity will interpose to correct palpable mistakes, for the purpose of carrying into effect the intention of the parties where that intention is clearly shown, but the proof should be clear beyond a doubt, because it is better that a doubtful written instrument should stand, than that a doubtful provision should be substituted by parol testimony." Harrington v. Harrington, 2 How. 701, 718 (1838). Rogers v. Clayton, 149 Miss. 47, 115 So. 106 (1927).

[50]Norton v. Coley, 45 Miss. 125, 128 (1871).

[51]Phoenix Ins. Co. v. Hoffheimer, 46 Miss. 645, 657 (1872).

[52]Bank of Summit v. McGehee, 142 Miss. 655, 660, 107 So. 876, 877 (1926); Jones v. Jones, 88 Miss. 784, 787, 41 So. 373, 373 (1906).

[53]Mosby et al. v. Wall et al., 23 Miss. 81, 82, 55 Am. Dec. 71, 72 (1851); St. Paul Fire & Marine Ins. Co. v. McQuaid, 114 Miss. 430, 444, 75 So. 255, 257 (1917).

[54]Lamar v. Lane et al., 170 Miss. 260, 266, 154 So. 709, 711 (1934).

declared that the burden grows heavier upon the complainant by the lapse of time before seeking reformation.[55] Although the effect of this requirement of clear and convincing evidence is little more than to fix the attitude of the court towards its problem, yet its beneficial effect cannot be gainsaid. The Chancellor's effort to evolve the precise terms of the original agreement from the mass of conflicting testimony is an administrative task that calls for every facilitating device the law can afford. At this point it might be well to clarify the holding in one of the older Mississippi decisions. In the case of *Gray vs. Roden*[56] the court held that only a mere preponderance of testimony was required in an action to reform a promissory note. Fisher, J., based his decision on the fact, assumed by him, that resort to equity for reformation was necessary only in *executed* transactions. Hence, seeing that a court of law could proceed to reform an executory instrument, and in doing so would require only the usual preponderance of testimony, the chancellor determined that he should not proceed upon a more stringent footing. Of course the difficulty here lies in the fallacious assumption that a court of law can reform an executory instrument. The case with which the Supreme Court was confronted was one involving the interpretation of an instrument rather than its correction.[57]

It is readily admitted that the interpretation of writings is not a function peculiar to chancery. Nor can it be denied that in interpreting a writing the court demands no unusual measure of proof. When proceeding to interpret a writing the court presumes that the instrument executed is the one intended by the parties. It perceives a patent ambiguity which it attempts to resolve. In this connection it is important to note that an ambiguity may exist by virtue of the presence of two inconsistent expressions, as where land is described by metes and bounds and also by quantum or is designated by some popular name, and between such designations there is an inconsistency. In such case the court may ignore one method of description in order to give full effect to another. Such a process is within the legitimate province of interpretation. However, it may happen that the parties have mistakenly inserted one term of description or have otherwise created an inconsistency by error. In

[55]Lamar v. Lane et al., 170 Miss. 260, 266, 154 So. 709, 711 (1934); Watson v. Owen, 142 Miss. 676, 684, 107 So. 865, 866 (1926).

[56]24 Miss. 667 (1852).

[57]At one place in the promissory note sought to be reformed the amount thereof was expressed as $4.00, while at another place the amount was apparently written as $400.00. The only task confronting the court was to determine the significance of two obscure ciphers appearing after the numeral four.

such a case of patent mistake interpretation may be all that is required. But in some instances reformation may be desirable or even necessary. If, according to the canons of interpretation, the erroneous description would prevail over the true one, correction of the instrument is the only relief available.[58] Or, further, if an official declaration of the true import of the document is necessary to its further utility in the commercial world, a judgment ordering a physical alteration of the instrument may be a necessary practical expedient. When the functions of interpretation and reformation thus overlap great care must be taken by the court that the limitations or liberties applicable to one form of relief are not applied to the other. It is submitted that the failure of the court to note this distinction between the remedies led it into the fallacy under which it labored in the decision of *Gray vs. Roden,* supra. This confusion is most likely to occur in those cases where the court, instead of adjudging that the instrument be reformed, adopts the shortcut procedure of interpreting it as though it were corrected without requiring a physical alteration. Here the processes are superficially the same.[59]

The importance of the distinction between reformation and interpretation is manifest when questions of parol evidence are involved. If the writing is the accurate embodiment of the agreement between the parties and was intended by them to contain all the terms of their bargain, they cannot later introduce parol testimony for the purpose of contradicting the same. In such cases they may resort to parol evidence only for the purpose of explaining an ambiguity on the face of the writing.[60] On the other hand, when it is complained that the writing is not what the parties intended it to be, and that it inaccurately expresses their real wishes in the matter the court must of necessity make resort to the circumstances attendant on the transaction in order to determine just what the real bargain was. For this reason, the reformation of writings constitutes an acknowledged exception to the parol evidence rule.[61] It is this

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[58]In the case of Dochterman v. Marshall, 92 Miss. 747, 46 So. 542 (1908), reformation was so employed as to make a general description control over a subsequent particular description which was erroneous, although such a result was contrary to the ordinary canons of interpretation. The same result was reached in Morrison v. Hardin, 81 Miss. 583, 33 So. 80 (1902).

[59]"Where circumstances justify reformation of a writing, affecting the contractual relations of the parties to the writing, a court may in its discretion without a preliminary decree of reformation give effect to the transaction as if it had been reformed." Cox. v. Hartford Fire Ins. Co. et al., 172 Miss. 841, 850, 160 So. 741, 744 (1935).

[60]2 WILLISTON, CONTRACTS, §§ 631, 632.

[61]". . . the power to relieve is said to be quite as clear when the mistake is shown by proof either written or parol, and it is not regarded as an infraction

exceptional nature of the remedy that is in part responsible for the requirement that the testimony be strong and convincing. For this reason, the language in *Gray vs. Roden,* declaring that the mere preponderance of evidence is sufficient, is particularly pernicious. However, the decision has not been followed. In fact, the next case arising in point of time involving an executory writing ignored the decision apparently and established again the orthodox requirement that the evidence be "of the clearest."[62]

We have seen that the parol evidence rule has no application in actions to reform. Similarly, in most jurisdictions the Statute of Frauds is not a bar to the reformation of instruments evidencing transactions required to be in writing. The asserted objection here is of a different nature. It is contended that to reform an instrument required to be in writing is tantamount to giving legal effect to terms in parol which the statute demands shall be written. Hence the court must qualify a positive statutory enactment. The force of this contention has led the courts of Massachusetts and South Carolina to refuse to correct a deed where the effect of reformation would be to increase the extent of the conveyance, although they will allow reformation where the result would be the mere correction of a misdescription or technical error.[63] Such limitations, however, have not met with general approval.[64] Mississippi is among those states which have tacitly refused to so limit their jurisdiction to reform.[65]

Similar reasoning is not applicable in favor of reformation as against the Statute of Wills. The right to devise property did not exist at common law prior to the Statute. Hence the reformation of a will would constitute the passage of title by way of devise in a manner contrary to the terms of the Statute. Furthermore, it is probably believed by the courts that a reformation of such a proceeding would open the door to countless ill-founded claims and doubtless to fraud. Hence it is well settled that reformation of a

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of the rule which prohibits the introduction of parol testimony to explain or vary written instruments, but is an exception to that rule, founded on the reason of the rule itself; to wit, a desire to suppress fraud and promote good faith and confidence in the observance of contracts." Simmons et al. v. North et al., 11 Miss. 67, 71 (1844). See Elliott v. Connell, 5 S. & M. (13 Miss.) 91 (1845). See also WILLISTON, CONTRACTS, § 631.

[62]Phoenix Ins. Co. v. Hoffheimer, 46 Miss. 645 (1872).

[63]Glass v. Hulbert, 102 Mass. 24, 3 Am. Rep. 418 (1869).

[64]3 WILLISTON, CONTRACTS, § 1552.

[65]See Howell et al. v. Gibson, 30 Miss. 464, 470 (1855); Simmons et al. v. North et al., 11 Miss. 67, 72 (1844).

will is not allowable.[66] This rule has found sanction in several Mississippi decisions.[67]

It is frequently said that equity will not reform a writing if the petitioner has been guilty of negligence or laches. Such a statement has received little more than a casual assent by the courts. Like many of the other glittering generalities in which equity abounds, the limits of the doctrine are vague and uncertain. The doctrine is frequently heaped into the verbiage of decisions otherwise to be accounted for, sheerly to supply extra weight. That mere negligence without more will not preclude reformation in an otherwise proper case must be manifest. Seldom are the courts confronted with purely unavoidable error. If, however, the negligence of the plaintiff has resulted in a change of position by the other party so as to make reformation unjust as to him, the court may well refuse relief for such a reason. In such cases the court falls back properly on the discretionary nature of the remedy. No more definite horizon of the doctrine can be delineated. Although on several occasions negligence has been pressed to the attention of the Supreme Court of Mississippi as a reason for refusing relief, the doctrine has received no more than a polite consideration and dismissal.[68]

Closely allied is the problem of failure to read a document as constituting a bar to reformation. Here the reasons are a little more cogent. Where two parties have opposed conceptions regarding the terms of an original ambiguous agreement and one of them draws up the writing according to his understanding of the transaction, if the other signs or accepts the document after an opportunity to read the same may logically be contended that thereby he outwardly, at least, manifests his willingness to be bound by the interpretation of the transaction as expressed in the writing. If the other party has changed his position in reliance on this apparent assent it is arguable that the

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[66] 2 PAGE, WILLS (1928) 1403. Schoefield, "So-Called Equity Jurisdiction to Construe and Reform Wills" (1912) 6 ILL. L. REV. 485.

[67] "It is well settled that no court can decree the reformation and correction of a will to make it conform to the purpose and intention of the testator not expressed in the instrument executed by him: (1) Because the testator has passed beyond the jurisdiction of all earthly courts; (2) Because a will is a voluntary conveyance, and if the court had jurisdiction of the testator, it would not compel him to make a will of any sort; (3) Because the Statute of Wills provides for the devolution of property by wills actually made, and not by those parties intend, however definitely, to make but do not make." Schlottman v. Hoffman, 73 Miss. 188, 198, 18 So. 893, 894 (1895). Ehrman v. Hoskins, 67 Miss. 192, 6 So. 776 (1889). Compare Christman v. Magee, 108 Miss. 550, 67 So. 49 (1914).

[68] See Cox v. Hartford Fire Ins. Co. et al., 172 Miss. 841, 851, 160 So. 741, 744 (1935); U. S. Fidelity and Guaranty Co. v. Parsons, 147 Miss. 335, 353, 112 So. 469, 472 (1927).

complainant should be estopped to assert his contrary understanding. Such a situation would arise only where the terms of the original understanding are fluid and susceptible to two equally reasonable interpretations, or where they cannot be adequately fixed by the evidence. But in most such cases it is submitted that reformation should be refused for a more fundamental reason, namely, that the original bargain cannot be fixed with sufficient definiteness to warrant the interposition of equity's aid. If then the court wishes to add the additional reason of failure to read as giving more weight to the decision, it is free to do so. In all other cases it is difficult to accept the view that the complainant by signing or accepting the document adopts whatever may be contained therein. The signer or acceptor in such instances adopts the writing only under the mistaken belief that it is in accord with his interpretation of the transaction. The other party, having undertaken the task of reducing to writing the bargain assented to, must be held to have impliedly assured the other that in executing the writing he would not go outside the agreement which they have reached. The adoption of a contrary view would encourage fraud. The court of this state, although acknowledging that failure to read may preclude reformation, has not specifically applied the doctrine as a bar.[69]

The next question for our inquiry relates to the Statute of Limitations. When is a complainant required to institute his action for reformation? In a recent Mississippi decision[70] it was held that Sec. 2286 of the Code of 1930[71] was not applicable to an action for reformation, at least not until the complainant's interest or title was menaced by an adverse claim. The implication to be drawn from the decision is that action must be brought within ten years after the assertion of such adverse interest. No quarrel can be made with that portion of the court's ruling which established that the Statute of Limitations should not start running at the moment the mistake was made. This is in accord with the majority rule. The question re-

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[69]U. S. Fidelity and Guaranty Co. v. Parsons et al., 154 Miss. 587, 606, 122 So. 544 (1929). Compare, Becker v. Dunagin, 113 Miss. 338, 74 So. 275 (1917).

[70]Newman v. White Lumber Co., 162 Miss. 581, 139 So. 838 (1932).

[71]"A person claiming land in equity may not bring suit to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or brought an action to recover the same, if he had been entitled at law to such estate, interest, or right in or to the same as he shall claim therein in equity. . . ." Miss. Code 1930, § 2886. The provision to which reference is made in this section is § 2285, Miss. Code 1930 providing in substance that an action at law to recover land must be instituted within ten years from the date of the accrual thereof.

mains, however, should the running of the statute be postponed only until the time when the mistake was discovered or in the exercise of reasonable diligence should have been discovered, or should it be further postponed until, as indicated by the court, the interest of the complainant has been actually menaced by the assertion of an adverse claim? Under the latter rule the complainant would be permitted to stand idly by, knowing of the error and not seeking to have it corrected, until his peaceable possession is actually threatened. In so holding the court has departed from the statutory provision applicable in similar situations where the complainant has been deprived of his interest through fraud.[72] Is there any reason why such a distinction between fraud and mistake should be drawn? And if so, is not the complainant who was injured by an innocent mistake the one of whom more diligence should be required in the assertion of his rights? Other jurisdictions have unhesitatingly applied the same rule to fraud and to mistake, either by drawing an analogy between the two phenomena under statutes similar to Sec. 2286,[73] or by applying the limitation as a portion of the common jurisdiction of equity.[74] But in the Mississippi decision referred to, it is argued that until an adverse claim has been asserted there is no one against whom an action can be instituted. This, it is submitted, is out of accord with the usual viewpoint of equity. When friendly application to correct the error has been made to the other party to the transaction or those claiming under him and subject to reformation, and such parties have refused to accede to the correction, the cause of action is complete. When the reformation proceeding is instituted and such parties answer or demur, asserting as a defense that they have made no claims under the alleged mistake, the court can very properly declare that the mere answer to the petition is sufficient claim, since a disclaimer was open to them. Such a ruling has been made in at least one jurisdiction.[75] It is believed that the better procedure would be to adopt similar rules in cases of fraud and

[72]". . . in every case of a concealed fraud, the right of any person to bring suit in equity for the recovery of land, of which he or any person through whom he claims may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which the fraud shall, or, with reasonable diligence might, have been first known or discovered." MISS. CODE 1930, § 2286.

[73]Ainsfield v. More, 30 Neb. 385, 46 N. W. 828 (1890); Brooksbank v. Smith, 2 Younge & C. Ex. 59, 160 Eng. Rep. 311 (1836).

[74]Thomas v. Thomas, 69 Colo. 282, 194 Pac. 606 (1921).

[75]Williams v. Burnette et al., 45 N. C. 209 (1853).

mistake under Sec. 2286, and to hold that the Statute of Limitations begins to run from the time the mistake was discovered or could have been discovered by the exercise of reasonable diligence. Further postponement is unnecessary. Especially is this true in reformation, where the evidence is usually of the most elusive and controverted nature.

LEGAL STANDARDS

JOHN S. BRADWAY*

The administration of justice, in a democracy, is, at once, a public and a professional problem.[1] The efficiency of the machinery and the quality of the product are of more than passing interest to both lawyers and laymen. Reforms, to be effective, should include technical and lay viewpoints.

The bar takes pride in the technical ability and high character of its members.[2] The record of that pride is found in proceedings of bar association gatherings,[3] reports of necrology committees,[4] legal biographies,[5] and descriptions of celebrated trials.[6] The building and maintenance of an honorable tradition is one of the professional duties of every lawyer.[7] Unless each lawyer feels a continuing obligation to contribute to the prestige of the profession it can hardly be kept at a high level. Disbarment as a penalty for one, who, intentionally, or from inertia, fails conspicuously to bear a reasonable share of the burden, might appear harsh; but such a policy would help to discourage those who argue that the clever lawyer is the one who reserves his time exclusively for his clients.[8]

The interest of the layman in the subject arises because, as client, or as a member of the general public, he is the one for whose benefit

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*Director of the Duke University Legal Aid Clinic.

**The writer desires to record his obligations to Mr. Harry Goldstein of the Class of 1936 of the Duke University Law School for aid in the preparation of the footnotes.

[1] See "Canons of Professional Ethics of the American Bar Association," No. 32. See also WILLOUGHBY, PRINCIPLES OF JUDICIAL ADMINISTRATION (1929) 3.

[2] See "Canons of Professional Ethics of the American Bar Association," No. 29.

[3] BALDWIN, THE YOUNG MAN AND THE LAW (1920); Daugherty, *Respect for the Law* (1921) 46 A. B. A. REP. 190, 191.

[4] See for example, *Biography of Deceased Members* (1935) 41 REP. OF PA. BAR ASSOCIATION 283.

[5] CHAMBERS, SAMUEL SEABURY, A CHALLENGE (1932); HARRISON, CLARENCE DARROW (1931).

[6] Dartmouth College Case, as reported in 1 WARREN, SUPREME COURT IN UNITED STATES HISTORY (1923). See also "Boston Slave Riot and Trial of Anthony Burns" (1854); "Trial of Laura D. Fair" (1871).

[7] See Preamble to "Canons of Professional Ethics of the American Bar Association"; also Canon 29.

[8] See for example, *A Discussion of Criminal Justice in America* (Jan. 5, 1935) THE LITERARY DIGEST 9; Charles H. Tuttle, *Society's Responsibility for Crime* (1934) 59 REP. A. B. A. 315, 320.

the whole system was devised. He has, long ago, recognized that the lawyer is essential.[9] He does not have to be told that the efficiency and character of the lawyer are matters of primary importance. But in some respects his ideas are based on inadequate data.

The layman secures his information about the lawyer from personal contact as litigant, witness, or juror. As a participant he tends to develop a subjective standard for evaluating the professional man, in terms of the success or failure of his side of the particular case, or because some personal characteristic of the lawyer appealed to him. At second hand, the talk of his friends, folk sayings,[10] classical literature,[11] the motion picture,[12] newspapers,[13] magazines,[14] and critical contemporary books,[15] supply mental pictures which may or may not be accurate, but which tend to persist and to color further consideration of the subject.

Perhaps because of the difference in source material, it comes about that, when one superimposes the professional picture of the lawyer upon the lay picture of that same personage, the outlines do not coincide. Which is correct? Probably neither. The lawyer tends to start his thinking with, and therefore, to overemphasize as typical the character of the great leaders of the profession; the layman, on the other hand, is besought by newspapers and other media to focus attention upon the more colorful personalities who appear, often against the lurid background of some sensational case.[16] The

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[9] 1 KENT, COMMENTARIES ON AMERICAN LAW 307.

[10] Bond, *The Law and Lawyers in English Proverbs* (Nov. 1935) 21 A. B. A. J. 724.

[11] See HOLDSWORTH, CHARLES DICKENS AS A LEGAL HISTORIAN (1929).

[12] The detective, Philo Vance, in the series of mystery stories by S. S. Van Dyne is in contrast to the district attorney, Markham. Perry Mason, in the motion picture series represented by "The Case of the Howling Dog," and "The Case of the Lucky Legs," goes about as near to the line of unethical conduct as it is safe to do.

[13] During the months of November and December, 1935, a press clipping service revealed a total of over 100 statements derogatory to the legal profession. Among them were such headings as:

"Called in Trial of H, P won't talk. Alleged runner of lawyer accused by bar committee refused to reply on grounds he might incriminate himself."

"Judge may refer Lawyer's tactics to bar association."

"Perjury in posting bond alleged against S."

"Court suspends Queens lawyer. N, ex county bar head, denies misappropriation charge."

"Grievance committee asks disbarment of four lawyers."

[14] See Dawson, *Frankenstein, Incorporated* (March 1930) 19 AMERICAN MERCURY 274; Beatty, *Justice Cracks the Whip* (June 1934) 117 AMERICAN MAGAZINE 72; Flynn, *Other People's Money* (Oct. 30, 1935) 84 NEW REPUBLIC MAGAZINE 333.

extremes of the profession are not necessarily fair samples. The great bulk of lawyers, perhaps because of innate conservatism and fear of unethical publicity, are largely inarticulate. It would seem timely for both lawyer and layman to give more attention to the public service rendered by the profession in the light of present day needs. The layman may be surprised at the quantity, the lawyer at the dearth, of the contributions.

It is because the duty of the lawyer is broader than serving the interests of the client that one is justified in an investigation which, otherwise, might seem a graceless prying into the privacy of his work and his character. Public criticism of the profession in recent years has made an inquiry into the quality of legal work a matter of public and professional concern. Proposals for public control of the professions are not new.[17] But recently it has been urged that the law be socialized, that lawyers be made purely public officials paid by and under the control of the state.[18] Replying to this has come a solemn warning from the President of the American Bar Association that, if the profession does not act, the public may.[19] There are many reasons why this profession should favor reforms initiated by itself rather than forced upon it from without.

No intelligent action can be taken, let the crisis be never so acute, unless the facts are available. It is beyond the scope of this paper to compile a complete picture of the lawyer as he appears to the public eye. But it is possible to study the nature and product of the professional machinery by which the quality of the work of the bar and the character of its members is tested. The inquiry may be further delimited, within reasonable space, if one proposes specific questions such as: How effective is the present machinery for determining the quality of legal work and character of the bar? What justifiable criticisms may be leveled against the present product of that machinery? If specific faults can be segregated, listed, illustrated, and brought out into the light of day, their seriousness and, perhaps, the nature of a remedy may be calculated.

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[15]See, for example, GISNET, A LAWYER TELLS THE TRUTH (1931).

[16]See the account of Darrow's Stirring defense of Loeb and Leopold. HARRISON, CLARENCE DARROW (1931) 247-273.

[17]See 12 ENCYC. OF SOC. SCIENCE, "Professions" 479.

[18]Laski, *The Decline of the Professions* (Nov. 1935) HARPER'S MAGAZINE 676.

[19]Ranson, *Which Road for the Legal Profession?* (1936) 22 A. B. A. J 21, 23.

AN EVALUATION OF THE QUALITY TESTING MACHINERY

There is a long and distinguished history of the efforts of the bar, in the fields of legal education[20] and admissions to the bar,[21] to see that the stream which feeds the profession is filtered. Law school instruction in legal ethics is subject to several criticisms,[22] but in other courses many student characteristics are evaluated.[23] More is discovered by the bar examinations themselves. Those in charge have an opportunity for evaluation of applicants, which, in comparison with the occasions afforded after admission, is admirable. Standards are continually being raised. Elimination of those deemed unfit is as important a part of the procedure as the training of the rest.

The present problem arises after the applicant has passed the threshold. Thereafter, short of disbarable activity, he is practically free from supervision. The fact that he has passed examinations is only prima facie evidence of his ability to assume the responsibilities of law practice. The idea that, if left alone, he will surely gravitate to the place at the bar best suited to his talents, assumes a public able to evaluate professional ability, and willing to undertake an uncompleted professional task. It overlooks the damage which the inefficient lawyer does to the prestige of the profession. It is easier, but hardly dignified, to shift the professional responsibility of cleaning its own house to the shoulders of the lay public. The client properly objects to being used as an experimental guinea pig by each new legal generation.

In addition to the sobering effect induced by individual dissatisfied clients and the general public, there are two pieces of professional disciplinary machinery. The grievance committee[24] and

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[20]See the "Handbooks" of the Association of American Law Schools.

[21]See the various reports of the Section on Legal Education and Admission to the Bar of the American Bar Association.

[22]See an address by Charles E. Clark, LAW PROFESSOR, WHAT NOW? "Handbook" of the Association of American Law Schools 20, 21.

[23]For a criticism of the case method, see an address by R. T. Steffen, *The Content of the Curriculum* (April 1932) THE AMERICAN LAW SCHOOL REV. 407.

[24]Sunderland, *A Unified and Self-Governing Bar* (1933) 11 TENN. L. REV. 236; but see Turrentine, *May the Bar Set Its Own House in Order?* (1935) 34 MICH. L. REV. 200 (an account of the emasculation of the State Bar Act by the Supreme Court of California).

the court,[25] with its quadruple powers,[26] are effective in their respective spheres. Their limitations of inaccessibility, complexity of machinery, and lack of fact finding devices are apparent.

Inaccessibility is a grave obstacle to certain groups of clients. Perhaps the ones most in need of professional guidance are those lacking ordinary self reliance, resourcefulness, courage, experience, persistence. They do not know where, or have not the ability, to make complaints. Traditionally, these are the widow and the orphan. In practice they include many sections of the public. Legal Aid societies meet many such.[27] It is said that those in the economic class above legal aid clients are similarly in need of special aid.[28] The present machinery imposes upon such a layman a burden of initiative, too often, beyond his capabilities.[29] If, for any reason, he fails to do his part, the whole evaluation process breaks down. If matters are not presented for determination the court and grievance committee cannot function.

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[25]Reed, ANNUAL REVIEW OF LEGAL EDUCATION (1930) 5; Cheadle, *Inherent Power of the Judiciary Over Admittance to the Bar* (1932) 7 WASH. L. REV. 320; Green, *The Court's Power Over Admission and Disbarment* (1925) 4 TEX. L. REV. 1, 17; Lee, *Constitutional Power of the Courts Over Admission to the Bar* (1899) 13 HARV. L. REV. 233, 251.

[26]The powers of the court in this direction are usually described as: the power of inquisition (People *ex rel* Karlin v. Culkin, 248 N. Y. 465, 162 N. E. 487 (1928)); the power to punish for contempt (Blodgett v. Superior Court, 290 Pac. 293 (Cal. 1930)); the power to disbar, suspend or censure *(In re* Peck, 88 Conn. 447, 91 Atl. 274 (1914) the power to render summary judgment Schell v. the Mayor, 27 N. E. 957 N. Y. App. 1891).

[27]The most satisfactory material with respect to this group of persons is contained in the records of the legal aid societies of the United States. The National Association of Legal Aid Organizations publishes annual figures as to type of case received. The figures dealing with complaints against members of the bar for the past ten years are as follows:

Year	*Number of cases involving complaints against lawyers*
1924	976
1925	776
1926	765
1927	1,537
1928	1,240
1929	1,127
1930	1,628
1931	1,858
1932	1,633
1933	1,745
1934	1,709

[28]Miller, *The Difficulties of the Poor Man Accused of Crime*, 124 THE ANNALS 63; Llewellyn, *The Bar Specializes With What Results?* (1934) 39 COMMERCIAL L. J. 336; Weise, *Why Not a Legal Clinic?* (June 1935) 1 CONSUMERS RESEARCH BULLETIN No. 8.

[29]One of the reasons for the popularity of administrative tribunals and officials in contrast to the old court procedure is the greater aid given the litigant.

Complexity of machinery is an obstacle of a somewhat different sort. The Grievance Committee, which views the problem solely as a disciplinary matter, distinguishes, as a first step, between those complaints which, to professional eyes, have merit, and those which do not. The former receive attention; the latter are rejected. The preparation of a complaint sufficient to move the committee necessarily involves the preliminary collection, organization and weighing of supporting information. Many clients do not possess the experience, training or ability to do such work. Others find it too expensive or cumbersome to hire a second lawyer to prosecute the first. If the defendant attorney keeps no records the task of the aggrieved client may be difficult, if not impossible. Granting the need for the grievance committee to maintain a quasi-judicial attitude, there is still a procedural gap to be bridged between the client and his remedy.

If the bar were to view problems of this sort as a part of its public relations field, the questions to be asked would be two: Has the client any sort of grievance? Has the client a legally meritorious grievance? Most cases involve the first and not the second question. At present there is too little attention paid to the complainant after it is decided the case has no legal merit. Yet such a client, doubly rebuked, may become sullen with resentment or cociferous with anger, outraged in his sense of propriety, bitter in his criticism. The damage to the prestige of the profession from this source cannot readily be measured, but it deserves to be considered as an important factor. A remedy is called for. Some additional machinery is needed to explain the rejection of the case to the client and, if possible, persuade him to accept cheerfully the opinion of the committee. It would help the public to know more about these legally unjustified complaints. The bar has done all too little in educating the public to adopt legally satisfactory criteria in professional matters.

The present machinery appears complex to the client because of the preliminary burden thrown upon him. If the present day typical grievance committee, itself, were to assume the task of detailed investigation, and explanation to the client, in every case which came to its attention, the expense would be a material item.[30] So the defect is a continuing one.

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[30]The American Bar Association expended the following sums in the operation of the Committee on Professional Ethics and Grievances: 1932, $10,011; 1933, $7,193; 1934, $4,054. The cost of operation was far greater than that of any other committee with the exception of the Executive Com-

The third obstacle is the absence of fact finding devices. The bar should know with certainty as a background the nature and extent of the whole field of law practice. It should know further the nature and extent of the problems in the public relations field. Some of these occur seldom and can be disposed of by the ordinary disciplinary machinery. Others appear in groups. Special treatment is necessary. At present these group problems are classifiable under two heads. The client is the major victim in ambulance chasing, misappropriation of client's funds, certain aspects of lay encroachment upon the practice of the law. The public, or the adverse party, is the victim where an unholy alliance exists between attorney and client as in the fields of crime,[31] bankruptcy,[32] divorce and alimony.[33]

At present until the unethical activity approaches a condition of public scandal, information seldom is available for the disciplinary groups. New machinery is needed, sensitive and comprehensive enough to give an accurate picture. In the above respects the existing machinery is inadequate.

It may be argued that inaccessibility, complexity, and lack of fact finding devices are, on the whole, beneficial; that it is poor policy to encourage criticism of the bar; that if a person does not take advantage of the existing machinery, it is a fair inference that the complaint has little merit. Such argument does not take into account the great differences between one client and the next. Even if the machinery were simple enough for the average reasonable man, the bar is faced too often with the unreasonable man. Because such a person does not forget his grievance it would seem the part of wisdom to keep his numbers down to an irreducible minimum. The bar is not the only group which has to deal with him.

The value of special machinery to make it easy to prepare and file complaints and provide patient, sympathetic, intelligent explanations of rejected requests as a matter of course, has been recognized

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mittee, and the Committee on Coordination of the Bar in 1934. See 57 A. B. A. J. 340; 58 A. B. A. J. 308; 59 A. B. A. J. 381.

[31]The activities of a lawyer in touch with the criminal underworld are described in FOWLER, THE GREAT MOUTHPIECE (1931).

[32]The bankruptcy racket as a means of defrauding honest creditors is described in THE DONOVAN REPORT ON THE ADMINISTRATION OF BANKRUPT ESTATES (1930), especially Part I.

[33]The divorce racket is described in Bergeson, *The Divorce Mill Advertises* (1935) 2 LAW AND CONTEMPORARY PROBLEMS 348.

by business.[34] Better Business Bureaus[35] do much to maintain commercial prestige by assuming the responsibility for investigating alleged improper practices. The layman cannot but notice a difference if he compares the businessman's anxiety to see if anything is wrong with the more conservative attitude of the grievance committee which, as a matter of professional courtesy, waits until well authenticated information is brought to it; which often meets in the private law office of the chairman, a place difficult for the public to find even if there is a notice on the office door; which has been trained to indulge the presumption of innocence of the accused until guilt is proven and assumes an attitude of quasi-judicial reserve lest it prematurely and negligently ruin the reputation of a fellow attorney. For lack of facts no one knows the nature and extent of the public bias.[36]

The product of the disciplinary process—the data now collected by courts and grievance committees—is also subject to criticism. The reported cases deal largely with excess of zeal, energy, activity; too little with inertia, slothfulness, incompetence. Too many purely professional problems are, in practice, regarded as having an adequate remedy if, under the law, the client may sue the lawyer for damages. While general standards are clear their application to specific sets of facts, perhaps because the facts are not always set forth in detail in the opinion, leaves the reader of judicial opinions uncertain. Uniformity and predictability are lacking. Two examples must suffice—legal courage and legal incompetence.

LEGAL COURAGE

The courts have had few occasions to pass upon the meaning of the word "courage,"[37] yet courage is a characteristic necessary at all points of a lawyer's daily routine. It may be demonstrated in the seclusion of his own office where he rejects unethical proposals of clients, refuses, because of conscientious scruples, to handle certain cases, plans campaigns for his clients which may involve him personally in public scorn or physical danger. It is present when he puts his duty to the court, the profession and the public above

[34]See the various codes of business ethics. The standards of civic clubs approximate Canons of Professional Ethics. These are epitomized in the statement "The Customer is always right."

[35]See BUSINESS WEEK (Jan. 21, 1931) at 18.

[36]McConnell, *What We Laymen Think of You Lawyers*, 1 GA. LAWYER 95; Beatty, *Lawyers on the Loose Bar Needs Regulation*, FORUM Vol. 13; 372-4.

[37]In Gardner v. State, 40 Tex. Cr. 19, 48 S. W. 170 (1898), distinguishing legal courage from temper, the court says:

his obligations to his client or himself. One must generalize about the lawyer's courage in private because there is seldom any record made.

Legal courage, exhibited in the public eye,[38] is more readily studied. But it is in court that the principal opportunities for measurement occur. The lawyer who goes too far is guilty of contempt. The limit of legal courage is marked roughly by the following types of cases in which the court approved or did not disapprove action of the lawyer:

1. Situations where counsel endeavors to show the disqualification of a sitting judge. Where the ground alleged is the relationship of the judge in the fourth degree to some person who has a direct pecuniary interest in the suit, but is not a party to the record,[39] alleging facts showing the bias or prejudice of the judge against the client, provided such facts are material to the issues and state just grounds for disqualification, even though they reflect on the integrity and good faith of the judge[40] (but see the balance of the opinion contra) alleging as a basis for disqualification past transactions not involved in the pending case and an alleged intermeddling by the judge in the domestic affairs of the client of a nature indicating the hostility of the judge.[41]

2. Situations where counsel injects himself into the proceedings. The filing and presentation of repeated motions which are thought to be for the purpose of delay or vexation, but which are not presented in a contemptuous or disrespectful manner and which do not

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"Courage means that quality of mind which enables one to encounter dangers and difficulties with firmness, or without fear or depression of spirits; valor, boldness, bravery, etc. A man may be a person of mild and agreeable temper or disposition, capable of patience or forbearance with coolness under great insults or provocation, and yet he may be a man of great courage or vice versa."

[38]See the account of Lord Coke's controversy with King James I in his effort to maintain the supremacy of the common law. LYON AND BLOCK, EDWARD COKE, ORACLE OF THE LAW (1929).

[39]Johnson v. State, 87 Ark. 45, 112 S. W. 143 (1908); *cf.* Bernstein v. La Fetra, 171 App. Div. 269, 157 N. Y. S. 386 (1916). See *In re* Hanson, 99 Kan. 23, 160 Pac. 1141 (1916) (where counsel said, "This court has been imposed on by counsel for defendant. This court has bitten so often on dope and extrinsic matter put out by opposite party that they are getting bold in the matter they put over." Quaere: Whether such ideas phrased in respectful language should be grounds for disbarment.)

[40]Webb v. Superior Court, 28 Cal. App. 391, 152 Pac. 957 (1915). See *In re* Mains, 121 Mich. 603, 80 N. W. 714 (1899); Bar Ass'n of San Francisco v. Philbrook, 35 Cal. App. 460, 170 Pac. 440 (1917) (referred to judges as criminal confederates).

[41]*In re* Cottingham, 66 Colo. 335, 182 P. 2d (1919); Also *In re* Rockmore, 127 App. Div. 449, 111 N. Y. S. 879 (1908); *In re* Dunn, 124 N. W. 120, 85 Neb. 606 (1909).

contain matter which, of itself, constitutes contempt;[42] stating in open court that he refuses to appear as counsel in a particular case because he could not be treated fairly and that the court was unfair, so long as the statements are neither contemptuous, defiant or necessarily inconsistent with the candor and courtesy which should characterize intercourse between bench and bar;[43] continuing to ask questions of a witness after the court has ruled against him.[44]

3. Situations where counsel publishes, or, addressing an open meeting, makes a criticism of the court in general: charging that the judge was wholly unfit and incapacitated to hold court and that, as a result, the court had broken down and ceased to function, provided the attorney disclaims intention to question the integrity of the court and in the light of a statute defining contempt proceedure;[45] charging that a certain acquittal "was secured by a prostitution of the machinery of justice to serve the exigencies of the Republican party."[46]

There are more cases on the other side of the fence determining what action by the lawyer exceeds the limits of courage.

1. Situations where counsel endeavors to show the disqualifications of a sitting judge; requesting in open court a substitution because "the said justice has formed, and, upon a previous trial expressed a most unqualified and decided opinion" contrary to the client;[47] charging that the judge was "unduly active in prospective litigation before this court."[48]

2. Situations where counsel injects himself into the proceedings:

a. In open court—Persisting in arguing a point after the court has announced that its ruling is final.[49]

b. In briefs or motions—Maliciously charging a magistrate with directing the constable to influence a juror against the client,[50] charging that the court was influenced by corrupt motives in certain rulings in pending cases,[51] charging "They (counsel) have grown

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[42]Johnson v. State, 87 Ark. 45, 112 S. W. 143 (1908).
[43]Hawes v. State, 46 Neb. 149, 64 N. W. 699 (1895).
[44]People v. La Fetra, 117 App. Div. 269, 157 N. Y. S. 386 (1916).
[45]*In re* Hickey, 149 Tenn. 344, 258 S. W. 417 (1924).
[46]*Ex parte* Steinman, 95 Pa. 220, 40 Am. Rep. 637 (1880).
[47]The Tweed contempt case. STRONG, LANDMARKS OF A LAWYER'S LIFETIME (1914) 81-86.
[48]Webb v. Superior Court, 28 Cal. App. 391, 152 Pac. 957 (1915).
[49]People v. Newburger, 98 App. Div. 92, 90 N. Y. S. 740 (1904); *In re* Mindes, 85 N. J. Law 117, 95 Atl. 743 (1915).
[50]State v. Barnett, 98 S. C. 422, 82 S. E. 795 (1914).
[51]People v. News Times Pub. Co., 35 Colo. 253, 84 Pac. 912 (1906).

to believe (perhaps erroneously as a general proposition) that courts of equity recognize no limitations upon their powers, and that they enjoy most the finding of new plausible ways for their distinction of rights, however fortified by constitutions, statutes, or well established principles, if once it has been made to see into them personally desirable to accomplish that end;[52] charging "the court (below) committed a colossal error in refusing to permit the equitable project, if the condition of this company was such that but sixty days thereafter, he (the vice chancellor) thought that this company should be strangled and destroyed."[53]

c. Writing letters to judges.—Charging that the judge's action was "contrary to every principle of law governing injunctions";[54] charging the judge with "outrageous, persistent, continued, illegal and unlawful rulings," accepting bribes and co-operating with attorneys in a "diabolical plot" which was "a malicious, vindictive, corrupt concoction";[55] writing the judge, "it is our desire that no such decisions or orders (as those made by the judge) shall stand unreversed in any court we practice in" and commenting that the ruling "is directly contrary to every principle of law governing injunctions, and everybody knows it, I believe";[56] writing the judge a threatening letter and giving the press a story of a proposed libel suit against the judge;[57] writing the judge "if one tenth part of the report of citizens of your district . . . be true, you are not only a blockhead, but you are the most corrupt man, both on the bench and off, that was ever elevated to judicial position."[58]

3. Situations where counsel publishes, or in open meeting, makes a criticism of the court, stating "seats on the Supreme Court of this state are a matter of barter, b-a-r-t-e-r, in plain words are bought and sold," "who paid money, how much was paid and who got the money at the election of the last supreme court judge;"[59] inciting clients at a distance, who were parties to a suit to influence the action of the court by intimidation applied to members by publications in newspapers and printed circulars.[60]

4. Miscellaneous situations.

a. Against the judge.

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[52]Casper v. Kalt-Zimmer Mfg. Co., 159 Wis. 517, 150 N. W. 1101 (1915).
[53]*In re* Glaubenman, 107 N. J. Eq. 384, 152 Atl. 650 (1930).
[54]*In re* Pryor, 18 Kan. 72, 26 Am. Rep. 747 (1877).
[55]*In re* Mains, 121 Mich. 603, 80 N. W. 712 (1899).
[56]*In re* Pryor, 18 Kan. 72, 26 Am. Rep. 747 (1877).
[57]People v. Metzen, 291 Ill. 55, 125 N. E. 734 (1919).
[58]*In re* Rogers, 28 N. M. 375, 212 Pac. 1034 (1923).
[59]*In re* Troy, 43 R. I. 279, 111 Atl. 723 (1920).
[60]*Ex parte* Cole, 1 McCrary 405 (Fed. Cas. No. 2,973, 1879).

Suing the judges—alleging that it was their duty to refrain from "negligently, wrongfully, improperly, wilfully, wantonly, maliciously and corruptly" making statements and findings without any legal basis, but that in rendering their opinion they did so in violation of their oaths of office;[61] threatening the judge, as he was descending from the bench, with personal chastisement for alleged conduct during the trial of a pending case.[62]

b. Against lawyers and parties.

Repeatedly causing oppressive criminal actions and proceedings to be begun against parties and attorneys opposed to the defendant in civil litigation; repeatedly, with ulterior motives, making threats of exposure and public disgrace against other attorneys;[63] threatening opposing parties with criminal prosecution if payment is not made in a civil proceeding;[64] inviting the opposing party into the jurisdiction upon pretense of arranging a settlement, but in reality to facilitate service of process upon him;[65] criticism of other lawyers.[66]

Greater latitude is allowed where the lawyer is out of the physical presence of the court and where the disagreement does not occur regarding a pending case. Wherever orderly procedures are provided by statute or rule of court for securing a change of venue, a new judge or a new ruling, the lawyer who creeps over the procedure is fairly safe. If the attack is upon the intelligence of the judge rather than upon his honesty or integrity, it is less likely to be corrected. Ordinarily a courteous, respectful demeanor will favor the attorney. Four obligations bind a lawyer—to his client, the court, the profession, and the community. It is natural that in close cases, courts should give weight now to one, now to another. Yet the result is absence of clear cut distinctions. The bar should be interested in having the application of the law brought to a greater degree of predictability than is observable in the two following examples:

1. Where counsel injects himself into the proceedings. In *Hawes v. State,*[43] the attorney "having, in open court, stated that he refused to appear as counsel in the case of the *State of Nebraska v. W. M. and F. J.,* now pending in this court, that he would not appear in this court, that he would not be treated fair and that this

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[61]People v. Standidge, 333 Ill. 361, 164 N. E. 844 (1928).
[62]Bradley v. Fisher, 80 U. S. 335 (1871).
[63]*In re* Feinstein, 233 App. Div. 541, 253 N. Y. S. 455 (1931).
[64]*In re* Gelman, 230 App. Div. 524, 245 N. Y. S. 416 (1930).
[65]*In re* Steinberg, 233 App. Div. 301, 252 N. Y. S. 755 (1931).
[66]*In re* Eaton, 60 N. D. 580, 235 N. W. 587 (1931).

court was unfair, thereupon the said H——— was by the court found guilty of contempt of court." The appellate court, in reversing the lower court, said, in part:

> "But, to sustain a connection in such a case, it should appear that the language or conduct imputed is per se contemptuous or innocent, according to the sense or manner in which it is employed, the record should show it to have been used in the culpable sense . . . Referring again to the findings of the court, we are impressed with the fact that the statements imputed to the accused are, per se, neither contemptuous, nor defiant nor necessarily inconsistent with the candor and courtesy which should ever characterize intercourse between the bench and bar. . . . A candid statement to the court or judge, in respectful language, of the reasons for such a cause, so far from being a contempt, is rather to be commended, as tending to remove the cause for whatever differences may exist between them, by reminding the court and counsel of their reciprocal rights and duties."

In contrast with this is the case of *In re S. O. Pryor,*[54] in which counsel wrote the judge a letter containing the sentence, "I can hardly believe that such is the fact, for it is directly contrary to every principle of law governing injunctions, and everybody knows it, I believe." The court comments:

> "Upon this we remark, in the first place, that the language of this letter is very insulting. To say to a judge that a certain ruling which he has made is contrary to every principle of law, and that everybody knows it, is certainly a most severe imputation. . . . To say to a judge that his ruling is contrary to every principle of law, may be simply a reflection upon his intelligence; but to couple with it an assertion that everybody knows it, is clearly an imputation upon his integrity. How can a judge be honest, and yet decide contrary to that which he, as well as all others, knows to be the law?
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> "We remark, secondly, that an attorney is under special obligations to be considerate and respectful in his conduct and communications to a judge. . . ."

In complaints against the administration of justice not related to a specific pending case, greater leeway is allowed. Yet, even here a difference of opinion in application of the rules is disclosed, for example, in the two following cases: In Rhode Island, in the case of *In re Troy,*[59] an attorney in a public meeting made the charge that seats on the Supreme Court were the subject of barter. The court, finding him guilty of contempt, used the following language:

> "The charge against the respondent is that of unprofessional conduct. We are called upon to determine whether his conduct has been such as to indicate that the license granted to him has been unworthily exercised, and whether he is fit to continue as a member of the bar and as an officer of the courts of this state. Such unfitness would equally be shown by proof of a false charge, maliciously made against the integrity of the justices of either court. A calumny of that character, if believed, would tend to weaken the authority of the court against whose members it was made, bring its judgments into contempt, undermine its influence as an unbiased arbiter of the people's rights, and interfere with the administration of justice. The cases are numerous in which courts, having authority over admissions to the bar and having the power of disbarment, have not hesitated to discipline attorneys for false and unwarranted attacks upon the integrity of inferior courts, and judicial officers. . . . We find the respondent guilty of gross official misconduct. . . . It is within the right of every citizen, whether a member of the bar or not, to publicly advocate and by fair and legitimate criticism and argument to urge changes in the law with reference to any matter including the election of the judiciary. . . . Because a man is a member of the bar, the court will not under the guise of disciplinary proceedings, deprive him of any part of that freedom of speech which he possesses as a citizen. The acts and decisions of the courts of this state, in cases that have reached final determination, are not exempt from fair and honest comment and criticism. It is only when an attorney transcends the limits of legitimate criticism that he will be held responsible for an abuse of his liberty of speech. We well understand that an independent bar, as well as an independent court, is always a vigilant defender of civil rights."

On the other side, in the Pennsylvania case, *Ex parte Steinman,*[46] the lawyers, who were editors of a newspaper, printed a story about a case charging that the acquittal "was secured by a prostitution of the machinery of justice to serve the exigencies of the Republican party," and added that as the judges belonged to that party it was "unanimous — for once — that it need take no cognizance of the imposition practiced upon it, and the disgrace attaching to it." The court said:

> "We may safely assume that it meant to charge, and did charge, that the judge had decided the case wrongfully from motives of political partisanship. We have no hesitation in pronouncing such a publication to be a gross libel on its face.

> Nothing can be more disgraceful—not even perhaps that of direct bribery—than such an imputation on the motives of judges in the administration of justice. . . . Whether a libel is an offense of such a character (as to show that the attorney was not fit to associate with honest men) may be a question, but certain it is that if the libel in this case had been upon a private individual, upon a public officer, such even as the district attorney, the court could not (under the statutes) have summarily convicted the defendants and disbarred them. . . . But the graveness of the offense of the complainants was that the publication was a libel on the court of which they were attorneys, and this, it is earnestly contended, was 'misbehavior in their office' which gave the court power to exercise summary jurisdiction by removing them. (The court then refers to a change in the law.) We need not say that the case is altered and that it is now the right and the duty of a lawyer to bring to the notice of the people who elect the judges every instance of what he believes to be corruption or partisanship. No class of the community ought to be allowed freer scope in the expression or publication of opinions as to the capacity, impartiality or integrity of judges than members of the bar. They have the best opportunities of observing and forming a correct judgment. They are in constant attendance on the courts. Hundreds of those who are called on to vote never enter a courthouse, or if they do, it is only at intervals as jurors, witnesses or parties. To say that an attorney can only act or speak on this subject under liability to be called to account and to be deprived of his profession and livelihood by the very judge or judges whom he may consider it his duty to attack and expose, is a position too monstrous to be entertained for a moment under our present system."

In these two examples the courts, in determining whether or not to discipline the lawyers, disagree upon what are, in a measure, similar sets of facts and cite in support of their actions conflicting duties. The obligations of the lawyer to his client and to the court in one case; to the court and to the public in the other, cannot be evaded. Yet the conscientious practitioner, through lack of predictability, faces a real dilemma.

LEGAL INCOMPETENCE

One would expect to contrast cowardice[67] with courage. This is impossible, because search has failed to reveal cases involving con-

[67]Bouvier's Law Dictionary defines cowardice as misbehavior through fear in relation to some duty to perform before an enemy, citing U. S. Rev. Stat. §§ 1342 and 1624.

duct to which the term cowardice can accurately be affixed. A broad definition would include scurrilous attacks[68] upon the court or its officers where there are no facts justifying such action and where the lawyer, having exhausted his logic, is attempting to browbeat or threaten the judge.

Aside from authorities, it seems that cowardice, in a very real sense, may affect the conduct of an attorney. A lawyer who agrees to a settlement because he is frightened by the prestige of his opponent; or who refuses to take into court a case, which should be litigated, because he recognizes his own inability in dealing with litigation procedure, but will not acknowledge it by associating with him a more experienced practitioner, may be guilty of cowardice. The nearest approach of judicial decisions to the subject is the slim list of cases in which legal incompetence[69] has been made the basis for disciplinary action. It is interesting to note that in many of them the action of the court is based upon several factors such as fraud, dishonesty and one cannot tell how for incompetence alone would have affected the situation. It might almost be said that legal incompetence is not a basis for disciplinary action. This is bad enough but there is a further evidence of indifference.

The bar has indicated its willingness to shift the responsibility for the maintenance of reasonable standards of professional competency to the shoulders of the lay public. There are many cases where a client in a civil action has recovered damages from a lawyer for negligence.[70] But after the recovery which has judicially determined the attorney's fault, there seems to be no case in which professional concern has been severe enough to bring about a disciplinary action.

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[68]See notes 54 to 58, *supra.*

[69]Bryant's case, 24 N. H. 149 (1851) (Incompetence no basis for disbarment on ground that statute imposed no requirement as to the knowledge of law), Smith v. State, 14 N. Y. 228 (1829) (By dictum, court may withdraw license because of attorney's loss of learning or mental capacity). See also People *ex rel* Chicago Bar Assoc. v. Charme, 288 Ill. 220, 123 N. E. 291 (1919) (No disbarment because of lack of diligence or good judgment); Also *In re* Boland, 140 Wash. 148, 248 Pac. 399 (1926) (An attorney can not be disbarred or suspended for a single act of negligence not amounting to gross incompetency); People *ex rel* Chicago Bar Assoc. v. Wing, 284 Ill. 647, 120 N. E. 451 (1918); Gould v. State of Fla. 127 So. 309 (1930); ("It would be a severe remedy to disbar an attorney for carelessness, inattention to duty, ignorance of his client's rights, and the remedies to enforce them, or even for an occasional equivocation in an effort to appear better informed and more alert than his client suspects . . .). Inattention to duty accompanied by deceit or imposition has been held ground for disbarment or suspension. See 69 A. L. R. 707.

[70]The writer desires to acknowledge his indebtedness to Russell L. Hiller, a student at Duke University School of Law, for material collected for the course of Legal Ethics, 1935-36 in a paper entitled "The Civil Liability of an

A SUGGESTED REMEDY

The foregoing review of cases indicates that, while there is legal machinery for listing quality and character, it does not cover the field nor is its product adequate to supply the basis for a code of standards. It is not clear on the facts how far a lawyer may go in discharging his obligation to a client without coming in conflict with his duty to the court. His dilemma presents the justification for remedial machinery and a more specific set of standards indicating the maximum and the minimum limits of his activity. Granting the need for flexibility, reasonable leeway, consideration of every case on its own merits, and all the other customary qualifications of a new proposal, those who agree that a dissatisfied client is a menace to professional prestige, may admit the need for a remedy in two directions:

1. A fact gathering agency to provide a basis for measuring the quality of legal work.

2. A code containing provisions more specific, more detailed, more nearly related to the daily work of the lawyer.

Both of these suggestions deserve further consideration.

The fact gathering agency should include two elements—a system of uniform record keeping in the individual law office, and a central agency for receiving information.

THE SYSTEM IN THE LAW OFFICE

Most law offices have adopted systems for recording the facts and progress of each case. Heretofore that data has been used to only a slight extent beyond the four walls. Legal aid societies have developed the healthy habit of using their records for many

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Attorney to his Client for Negligence, Mis-management and Incompetence." The following references are taken from that paper:

The attorney is liable in money damages to his client for want of such skill, care and diligence as men of the legal profession commonly possess in such matters of professional employment. In some limited instances the court will allow the client a new trial because of the lawyer's incompetence, 24 A. L. R. 1025. He is liable for loss to his client resulting from ignorance of settled rules of law and of practice (Krumboli v. Kinkel, 123 N. E. 205 (N. Y. App. 1919); Enterline v. Miller, 27 Pa. Super, 463; Goodman v. Walker, 30 Ala. 482); for loss resulting from poorly drawn documents, 43 A. L. R. 932; for loss resulting from negligence in title examination work (Watson v. Muirhead, 57 Pa. 161 (1868); Lowell v. Groman, 180 Pa. 532; Savings Bank v. Ward, 100 U. S. 195 (1879); 5 A. L. R. 1585 from faulty office system. *In re* Blatt, 246 N. Y. S. 77 (1930). See in general 5 A. L. R. 1385-9; 7 L. R. A. 669: 24 A. L. R. 1025-41; 43 A. L. R. 932; 47 A. L. R. 267-69; 69 A. L. R. 705-9.

purposes, such as a basis for remedial legislation.[71] Physicians have learned that the records of their patients' progress are of value in the public health field, in preventive medicine, in recording the progress of certain remedies.[72]

The first step in securing the facts is to require, by common consent, bar association edict, rule of court or statute, that all law offices keep certain minimum records regarding their cases and clients. No elaborate system is desirable. A simple card for each case might contain the names of parties and witnesses, the nature of the case, and a dated chronological listing of what was done. If one wished more, a filing system and a follow up system might be added.

The practice of keeping this data would act as an incentive to the individual lawyer to maintain a high standard of effectiveness. It would provide a most effective defense to unmerited criticism and would give the Grievance Committee an impersonal summary of facts if a client wants to complain. There should be only three occasions, and then only in response to a court order, when anything more than the statistical information might be brought to light: (a) in the interest of the client, (b) in the interest of the attorney, (c) in the interest of the public when circumstances indicated the existence of an unholy alliance between attorney and client. Thus there would be no conflict with the rules providing for confidential inviolability of facts given in the attorney-client relationship.[73] If the report indicated that in X county there were ten instances of ambulance chasing this year, as against fifteen occasions last year, the record would be highly impersonal. The fact that yellow fever had declined during a certain period in no way violates the confidential relation of physician and patient. Yet, if the facts are required to be kept by the lawyer they may be secured under proper

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[71]Records of legal aid societies have been a significant factor in convincing legislatures that the uniform small loans law was a practical method of combatting the loan shark; other legal aid activities looking toward legislation are in the fields of court costs and the collection of wage claims. See "Report of Legal Aid Committee of American Bar Association," 1924, p. 386; 1925, p. 456; 1927, p. 324.

[72]N. Y. CONSOL. LAWS (Cahill, 1930) c. 46, § 320 (reports of tuberculosis by physicians); c. 46, § 25 (duty to report contagious disease). N. C. CODE ANN. (Michie, 1935)§ 7192 (physicians to report cases of venereal diseases to health authorities); Ill. REV. STAT. ANN. (Smith--Hurd, 1933) c. 91, § 106. See statistical studies of health and medical care, CARTER, STATISTICS IN SOCIAL STUDIES (1930) at 31.

[73]The attorney's privilege against disclosure of confidential communications would obviously not be violated by such an index. See 5 WIGMORE, EVIDENCE (2d ed. 1923) § 2290 *et seq.* for a complete account of the privilege.

circumstances. It appears that this device will supply the basic raw material.

THE FACT GATHERING AGENCY

The fact that the information is in the lawyer's office is not a complete solution of the problem. A central depository for facts about law practice containing an impersonal index would seem essential.

The suggested machinery would be simple and inexpensive in operation. It would be, in effect, an office for the collection of legal vital statistics, organized and operated like the existing bureaus which gather data more closely related to the field of the medical profession. A room, a filing system, clerks, a statistical procedure, and periodic reports would cover the essentials. Funds for it might be secured from the public treasury, the bar, commercial agencies, or from private foundations. Supervision and control should be exercised by the county bar association. An office might be located in each county or group of counties. The clerk of the court might assume the duties if the enterprise became a public agency.

To it reports covering the functioning of the entire machinery for administering justice should be made. In the present instance only those reports relating to standards of work of lawyers need be noticed. The idea of a ministry of justice is not new.[74]

The form of such a report should be kept as simple as possible.[75] Each law office should report, upon the conclusion of each piece of legal business, the following: a symbol representing the client; a symbol representing the lawyer, the nature of the matter, the results. Each client should report upon the conclusion of each piece of legal business the following: the client's name, the lawyer's name, the nature of the matter, the client's evaluation of the lawyer's work, as either "better than satisfactory," "satisfactory," "not satisfactory"; if the work is not satisfactory, reasons should be given.

Opposing counsel and other parties, witnesses, and interested persons might make reports similar to the clients.

Each judge before whom counsel appeared might report his opinion of the quality of the work giving the name of the proceed-

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[74]See Acheson, *A Minister of Justice* (1933) 31 THE LEGAL AID REV. 8; Cardozo, *A Ministry of Justice* (1921) 35 HARV. L. REV. 113; Bacon, *On A Ministry of Justice* (1935) 22 VA. LAW REV. 175.

[75]For a description of an attempt to develop a device for measuring the efficiency of work of family case work agencies, see Hurlin, *Statistical Studies of Dependencies* (1931) STATISTICS IN SOCIAL SCIENCES 43.

ing, the name of counsel and grading the work as "more than satisfactory," "satisfactory," or "not satisfactory." Perhaps it would be easier to obtain a blanket report indicating that out of a certain number of lawyers appearing before a judge during the period so many were above average, so many average, and so many below average.

Such opinions are now formed. The only new factor would be the recording. Allowing for the personal considerations which might affect the accuracy and judgment of the recorders, the lack of courage in expressing on paper evaluations of one's fellows, the plan will provide certain material not now available, to grant immunity to action for libel to recorders might be a wise precaution.

The material thus gathered would be available for several purposes. Those lawyers against whom complaints of undue seriousness or volume were filed would stand out from among their fellows. The presence of legal "rackets" would be more readily detected in such a comprehensive collection of data. They could be dealt with if the proper bar committee followed the trail directly into the offices where conditions warranting investigation existed.

Each county could produce periodic reports which would indicate through statistical curves what was happening in the public relations field of the bar.

The reports for each state might be collected from the various counties by the state bar association and should be interesting for comparative purposes. Similarly, the American Bar Association might gather from the various states national data of even greater interest. County, statewide, and national reports would be purely statistical and anonymous including the type of legal problem in which the complaint occurred, the nature of the complaint, and the disposition. Comparative figures from year to year would prove graphically which problems were increasing and which were diminishing, whether the battle was being won or lost, whether or not specific remedial devices were effective. In a word, here would be the facts on which to base defenses against public criticism, or platforms for aggressive reforms where needed.[76]

The fact gathering agency would add to the present grievance committee the following elements: accessibility, simplicity adapted to the capabilities of the most hesitant complainant, and a comprehensive collection of facts.

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[76]See "Beginning of Judicial Statistics," Marshall, STATISTICS IN SOCIAL STUDIES (1931) 100 for a short discussion of the purposes of such statistics.

Periodically, the grievance committee, from its survey of the facts, might recommend to the Bar Association, the court, or the legislature changes in the rules establishing standards of quality and character.

THE VALUE OF THE ORGANIZATION

Few proposals for reform are perfect. The only effective procedure for determining their value is by weighing the advantages and disadvantages. Objections to the present suggestions will be based upon the regimentation, expense, apparent novelty, and yet these may be more than offset by the usefulness of the device in the present emergency. The legal profession is, and has been the subject of vigorous attack. The best evidence that the situation is serious is found, not in the statements of dissatisfaction appearing in the public press, but in the defensive activities of the profession itself.[77] If lawyers were not aroused to the significance of the public relations field of the bar, one would not expect to see them engaged in such activities as: the increase in the integrated bars,[78] the opposition to lay encroachments,[79] the American Bar Association program of leadership in legal reform.[80] Contact with facts rather than with theories has produced these reactions. The reasonable lawyer should be greedy for more facts and should welcome the setting up of a fact gathering device. The emergence of bar surveys of a less comprehensive and continuous sort[81] than the present proposal indicate that regimentation, expense and novelty are not insurmountable obstacles.

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[77]Parker, *Enforcement of Professional Ethics* (1935) 21 A. B. A. J. 514; Armstrong, *The Time Has Come for Action* (1935) 21 A. B. A. J. 526.

[78]Ala. Code Ann. (1928) §§ 6220-6239; Ariz. Session Laws 1933, c. 66; Cal. Gen. Laws Act 591; Idaho Code Ann. (1932); §§ 3-401 to 3-417; Ky. Rev. Stat. (Baldwin, Supp. 1934) § 101-1; La. Acts 2d Ext. Sess. 1934, No. 10, p. 70; Mich. Comp. Laws (Mason, Supp. 1935) § 13603-1; Miss. Laws 1932, c. 121; Nev. Comp. Laws (Hillyer, 1929) §§ 540-590; N. M. Comp. Stat. (1929) §§ 9-201 to 9-212; N. C. Code (Michie, Supp. 1933) §§ 215 (1) to 215 (18); N. D. Comp. Laws (Supp. 1925) §§ 813a1-813a5; Okla. Laws 1929, c. 264; Ore. Laws 1935, c. 28; S. D. Laws 1931, c. 84; Utah Rev. Stat. (1933) §§ 6-0-1 to 6-9-23; Wash. Rev. Stat. (Remington, Supp. 1934) §§ 138-1 to 138-17.

[79]Hicks and Katz, Unauthorized Practice of Law, published by the A. B. A. 1934.

[80]See National Bar Program addresses on a more effective disciplinary procedure (Aug. 1935) 21 A. B. A. J. 514 and following.

[81]Lloyd K. Garrison, *Results of the Wisconsin Bar Survey* (April, 1935); 8 Am. L. School Rev. 116; Rutledge, *A Survey of the Welfare of the Missouri Bar* (April, 1935) 8 Am. L. School Rev. 128; Clark, *A Proposed National Survey of the Bar* (April, 1935) 8 Am. L. School Rev. 138.

The threatening problem of public control of the professions is no idle dream. The lack of a clear line of distinction between the functions of the legislative and judicial branches of government,[82] the layman's curious mixture of confidence in, and hostility to, any professional man are not vague ideas. The more keenly a member of the bar feels the external pressure — legal, social, and economic— the more likely he is to see value in placing the profession upon a firmer foundation of public respect which can be attained only by continuous contact with the facts.

CONCLUSION

Here, then, is a situation and a proposed remedy. The fact gathering agency is no panacea, but neither is it essentially impracticable. The use of vital statistics by the medical profession is accepted as valuable. The use of statistics as to business conditions by mercantile and commercial organizations is universal. By devising a similar system to bring it data as to the administration of justice, the legal profession will protect itself, reassure the public, and provide a realistic basis for those legal reforms which are necessary to an ever changing social order.

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[82]Pillsbury, *The Power of the Courts to Declare Laws Unconstitutional* (1923) 1 CAL. L. REV. 313; McBain, *The Issue: Court or Congress?* (Jan. 19, 1936) N. Y. Times.

DECLARATORY JUDGMENTS

DAVID C. BRAMLETTE*

Approximately two-thirds of the cases in the English Chancery Reports are based on proceedings for declaratory judgments.[1] Having origin in the mists of legal antiquity and provided for and invoked in many of the nations of the world for centuries, and for a number of years in thirty-four states and territories of the United States, nation wide interest was augmented by the enactment into law by the Congress of the United States of the federal Declaratory Judgments Act, signed by President Roosevelt on June 14, 1934, reading as follows:

> "Sec. 274 D (Judicial Code). (1) In cases of actual controversy the courts of the United States shall have power, upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal regulations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.
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> "(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to the court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.
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> "(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not."

The Agricultural Adjustment Act, 1933, prohibited a declaratory judgment in connection with any tax or interest or penalty therein provided for and thus amended the original federal Declaratory Judgment Act. However, the Supreme Court of the United States, in *United States v. Butler*,[2] commonly referred to as the Hoosac

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*Member of the Woodville, Mississippi, Bar; Delegate to London Meeting of the American Bar Association (1924); chairman Davis-George Statues Commission (1931).

[1] Borchard, DECLARATORY JUDGMENTS (1934) preface viii.

[2] 80 L. Ed. 287 (1936).

Mills Case, held that act in its entirety to be in conflict with the federal Constitution, therefore having the effect of eliminating that amendment. However, on August 30, 1935, Congress amended the Federal Declaratory Judgments Act by providing that the Act does not extend to controversies involving Federal taxes.

The federal act has already been upheld and applied by the United States Circuit Court of Appeals, Fifth Circuit, in *J. B. Gully, State Tax Collector of Mississippi, et al. v. Interstate Natural Gas Company,*[3] by decision handed down in New Orleans on February 14, 1936, and in *J. B. Gully, State Tax Collector of Mississippi, et al. v. Memphis Natural Gas Company,*[4] decided on the same day. United States District Judge Holmes invoked the federal act in these cases as early as September 17, 1934.[5] In the Interstate Case, *supra,* United States Circuit Judge Hutcheson, for the Court said:

> "The purpose of the statute is, we think, wise and beneficent. It will, if applied in accordance with its terms, effect a profound, a farreaching, a greatly to be desired procedural reform. We see no sound reason for limiting it."

The Supreme Court of the United States on February 17, 1936, in effect recognized the constitutional validity of the federal Declaratory Judgments Act in the "TVA" case, *Ashwander v. Tennessee Valley Authority.*[6] Quoting from the opinion in that case by Mr. Chief Justice Hughes:

> "The Act of June 14, 1934 (Note No. 7), providing for declaratory judgments, does not attempt to change the essential requisites for the exercise of judicial power. By its terms, it applies to 'cases of actual controversy,' a phrase which must be taken to connote a controversy of a justiciable nature, thus excluding an advisory decree upon a hypothetical state of facts. See Nashville, Chattanooga & St. Louis Rwy. Co. v. Wallace, supra."

The purpose and utility of a declaratory judgment may strikingly be illustrated by a remark of Representative Gilbert of Kentucky, in the course of his discussion of the federal Declaratory Judgments Bill, on January 25, 1928, when he said:

> "You have the same Court, the same jurisdiction, the same procedure, the same parties, and the same questions. Under

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[3]82 Fed. (2d) 145 (1936).
[4]82 Fed. (2d) 150 (1936).
[5]Interstate Natural Gas Co. v. Gully, 8 Fed. Sup. 174 (1934); Memphis Natural Gas Co. v. Gully, 8 Fed. Sup. 169 (1934).
[6]The United States Law Week, February 18, 1936, Index 524, 56 S. Ct. ..... (1936).

> the present law you take a step in the dark, and then turn on the light to see if you step into a hole. Under the declaratory judgment law you turn on the light and then take the step."

The declaratory judgment has superseded in many cases the necessity of an injunction with its attendant risk of incurring damages and penalties. In addition, in recent years, it has become increasingly difficult to obtain injunctive relief, for example, to restrain the assessment and collection of unconstitutional taxes. The Supreme Court in *Mathews v. Rodgers,*[7] declined to sustain equity jurisdiction or the restraining of the collection of an alleged unconstitutional tax on the ground that, under the Mississippi law and decisions, the taxes could be paid by the tax payer and recovered if unconstitutional or unlawful. To those familiar with the Herculean task of recovering taxes in Mississippi from any tax collecting agency, this decision appears unusual, particularly in view of the fact that should the tax money reach the State Treasury, a legislative appropriation would be required[8] to make the payment and no one has yet devised any human agency for coercing a Mississippi Legislature. That decision of the Supreme Court of the United States was based on a decision of the Supreme Court of Mississippi, *Coulson v. Harris.*[9] Both of these decisions, however, hold that under special circumstances showing the inability of the tax payer to pay the tax or of the tax collecting agency to respond to judgment, or any other fact rendering the remedy at law doubtful, incomplete or inefficacious, chancery will put forth its restraining hand. All of these questions of equity jurisdiction for coercive relief are eliminated by a declaratory judgment which provides that in cases of actual controversy the courts of the United States having general federal jurisdiction, shall have power to declare rights and other legal relations. In other words, a declaratory judgment eliminates the old forms of procedure that could be raised only for a suit for injunction or to recover the tax after its payment.

A declaratory judgment may be resorted to in many fields of the law, but its use is nowhere more important than to save the people from unconstitutional oppression in the attempted infliction of unconstitutional taxation or the infliction of taxes in regard to which the government or the tax payer may be in doubt as to their validity. The tax collecting authority invokes the act probably more frequently

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[7]284 U. S. 521, 52 S. Ct. 217, 76 L. ed. 447 (1931).
[8]Miss. Code Ann. 1930, § 3276.
[9]43 Miss. 728 (1871).

than the tax payer and there is no reason why both should not petition for a declaratory judgment under the federal act in cases of which the federal courts have general federal jurisdiction and wherein actual controversy exists. A tax payer may claim immunity from an assessment for collection of taxes by reason of contractual exemption, use, nature or location of property, or on the ground that he is personally exempt, or for other valid reasons. In regard to these, Borchard says:

> "In all these cases the declaratory action has made judicial recourse as simple as administrative recourse before a board of tax appeals an end earnestly to be desired."[10]

Unfamiliarity frequently generates suspicion, and the declaratory judgment has been no exception to that trait of human nature. Doubt existed for many years in the state and federal courts in regard to whether a declaratory judgment presented a case or controversy for the exercise of judicial power, within the meaning of the federal constitution; for some time, the federal courts, including the Supreme Court of the United States, failed to distinguish declaratory judgments from advisory opinions or decisions in moot cases.[11]

A declaratory judgment is not as novel as it first appears when we consider that in practically all jurisdictions there are provisions for proceedings to quiet title to real estate or for a bill quia timet, which in effect are nothing more than proceedings for declaratory judgments, if not designated by that name.

All doubts as to the constitutionality of a declaratory judgment under proper statute were removed by the Supreme Court of the United States in an exhaustive opinion by Mr. Justice Stone in *Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace,*[12] wherein a declaratory judgment law of the State of Tennessee was involved. Mr. Justice Stone said:

> "The issues raised here are the same as those which under *old forms* of procedure could be raised only in a suit for injunction or one to recover the tax after its payment."

And Note 1 to the opinion of Mr. Justice Stone follows:

> "The procedure authorized by this statute has been extensively adopted both in this country and abroad. It is said that the Uniform Act is in force in sixteen of the states and

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[10]Borchard, DECLARATORY JUDGMENTS (1934) 622.

[11]Liberty Warehouse Company v. Grannis, 273 U. S. 70 (1927); Willing v. Chicago Auditorium Association, 277 U. S. 274, 71 L. ed. 541 (1925); Piedmont and Northern Ry. Co. v. United States, 280 U. S. 469, 74 L. ed. 551 (1930); Arizona v. California, 283 U. S. 423, 75 L. ed. 1154 (1931).

[12]288 U. S. 249, 77 L. ed. 730, 87 A. L. R. 1191 (1932).

> Porto Rico and that similar statutes have been enacted in thirteen states, Hawaii and the Philippines. For a discussion of the history of this procedural device in France, Germany, Spain, Spanish America, Scotland, England and India, as well as in the United States, and the types of controversies in which it has been invoked, see Edwin M. Borchard, The Declaratory Judgment—A Needed Procedural Reform, 28 Yale L. J. 1, 105; Judicial Relief from Peril and Insecurity, 45 Harvard L. Rev. 793, 806; The Constitutionality of Declaratory Judgments, 31 Columbia L. Rev. 561."

Passing squarely on the constitutional question Mr. Justice Stone further said:

> "But the Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedy. The judiciary clause of the Constitution defined and limited judicial power, in the particular method by which that power might be invoked. It did not crystalize into changeless form the procedure of 1789 as the only possible means for presenting a case or a controversy otherwise cognizable by the federal courts."

At a hearing before a sub-committee of the United States Senate, April 27, and May 18, 1928, Mr. Justice Cardozo, who was at that time Chief Judge of the Court of Appeals of New York, said:

> "I studied the subject of declaratory judgments before the statute on that subject was adopted in this state. My conviction of its utility has been strengthened by experience of its practical operation. I have not felt at any time that the remedy has been abused. I have been impressed on numerous occasions with the belief that it has supplied a useful expedient to litigants who would have otherwise acted at their peril, or at best would have been exposed to harrowing delay."

The declaratory judgment had its origin in Roman Law and for many centuries has been invoked in those countries of Europe whose jurisprudence is derived therefrom. From Continental Europe the declaratory judgment was adopted in Scotland more than four centuries ago, and authorized in England by Act of Parliament in 1852. At the present time, declaratory judgments are authorized by law in Ireland, India, Canada, Australia, New Foundland, New Zealand and other parts of the British Empire; in Germany, Austria, and other European countries; and in Brazil and elsewhere in South America.

In the United States, in addition to the federal act of 1934, since 1919, thirty-four States and Territories of the Union have enacted the declaratory judgment statute. The movement for the adoption of this statute has been particularly active since the adoption in 1921 by the Commission of Uniform State Laws of the Uniform Declaratory Judgment Act. The States and Territories that now have such statutes are: Arizona (1927) (Uniform Act); California (1921); Colorado (1923) (Uniform Act); Connecticut (1921); Florida (1919); Hawaii (Territory) (1925); Idaho (1933); Indiana (1927) (Uniform Act); Kansas (1921); Kentucky (1922); Massachusetts (1929); Michigan (1929); Minnesota (1933); Nebraska (1929) (Uniform Act); Nevada (1929) (Uniform Act); New Hampshire (1929); New Jersey (1924) (Uniform Act); New York (1921); North Carolina (1931) (Uniform Act); North Dakota (1923) (Uniform Act); Ohio (1931); Oregon (1927) (Uniform Act); Pennsylvania (1923) (Uniform Act); Philippines (Territory) (1930); Puerto Rico (Territory) (1931) (Uniform Act); Rhode Island (1923); South Carolina (1922); South Dakota (1925) (Uniform Act); Tennessee (1923) (Uniform Act); Utah (1925) (Uniform Act); Vermont (1931) (Uniform Act); Virginia (1922); Wisconsin (1927) (Uniform Act); and Wyoming (1923) (Uniform Act).

The declaratory judgment is of vital importance at this time when the power of taxation is employed for such varied governmental purposes. Mr. Chief Justice Marshall is widely credited—at least in America—as being the author of the aphorism, "The power to tax is the power to destroy," and this statement has resounded through legislative halls and in the courts for more than a century. Supposed to have had its origin prior to Sir William Blackstone, Mr. Chief Justice Marshall was not the original author in America of the statement on which the quoted remark is based, and the original author in America, Daniel Webster, did not make the statement quoted or even a statement on which the quoted remark could be properly based. In *McCulloch v. Maryland*,[13] Mr. Chief Justice Marshall said:

> "That the power to tax involves the power to destroy; . . ."

In the argument in that case Mr. Webster said:

> "An unlimited power to tax involves, necessarily a power to destroy; . . ."

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[13] 4 Wheaton 316, 431, 4 L. ed. 579 (1819).

It is at once apparent that the "power to tax" differs widely and falls far short of the *"unlimited power to tax."* The lamented Mr. Justice Holmes held that the power to tax was not the power to destroy and said:

> "The power to tax is not the power to destroy while this Court sits."[14]

The modern idea seems to be that the "power to tax" is not only the "power to destroy," but also the power to regulate industry, liberty, and habits of the people generally, all of which accentuates the value of the declaratory judgment more than during any other period in the history of the nation. With the advent of the twentieth century, we are becoming a people generally governed by tax laws, bureaus, and administrative agencies. We appear to have abandoned in practice the self-evident governmental truth that the best governed nation is the least governed.

Paragraph (3), of the federal Declaratory Judgments Act, providing for trial by a jury, has been the cause of the question being raised as to whether a declaratory judgment proceeding is equitable or legal, the reply to which is that it is either. The Act provides the remedy to be applied either in a proceeding in equity or at law, if applicable. If the proceeding is in equity the provision for a jury is not applicable. A jury was provided solely for the purpose of refuting any constitutional doubt on that point. To quote Borchard:

> "The question has arisen whether this provision requires a jury trial in every case, or whether such trial depends upon whether the issue is legal or equitable. It may be said that the draftsmen of the Uniform Act included the provision with the sole purpose of refuting any constitutional doubt on the point; it was not intended to indicate that the declaratory action is either equitable or legal or to indicate that jury trial is necessary in any case. Declaratory relief is neither strictly equitable nor legal, although, as will presently be observed, its historical sources are almost exclusively equitable."[15]

While a declaratory judgment may be rendered without coercive relief thereunder, the request for combined forms of relief, declaratory and coercive, is frequently resorted to.[16] In *Black v. Little,*[17] the court held an actual controversy to be presented within

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[14]Panhandle Oil Co. v. Mississippi, 277 U. S. 218, 72 L. ed. 857, dissenting opinion (1928).

[15]Borchard, Declaratory Judgments (1934) 120.

[16]Borchard, Declaratory Judgments (1934) 175, 176.

[17]Black v. Little, 8 Fed. Sup. 867 (1934).

the federal Declaratory Judgments Act, notwithstanding the fact that plaintiffs were not entitled to injunctive relief, and as decisive of that question, quoted from *Nashville, C. & St. L. Ry. Co. v. Wallace,*[18] as follows:

> "As the prayer for relief by injunction is not a necessary prerequisite to the exercise of judicial power, allegations of threatened irreparable injury which are material only if an injunction is asked, may likewise be dispensed with, if, in other respects, the controversy presented is, as in this case, real and substantial."

The petition for a declaratory judgment may be as simply drafted as the wording of the federal Act itself, if in a federal court. The usual jurisdictional averments should be made and a clear statement of the merits set out, demonstrating that an actual controversy exists, and the reasons why plaintiff is entitled to a declaration of right or a declaratory judgment, either with or without coercive relief to enforce it. If the proceeding is in equity, the declaratory judgment may be embodied in the final decree, setting out that the case is one of actual controversy, pending between plaintiff and defendants, in which appropriate pleadings to declare rights were lawfully and properly submitted to the court for a declaratory judgment, to which plaintiff is entitled, and further declaring the respective rights of the parties to the controversy existent before the Court.

A majority of the states have already adopted a Declaratory Judgments Act, and in those states in which it has not been adopted, it will become an issue at some time in the near future. As stated, a Uniform Declaratory Judgments Act has been drafted[19] by the Commission of Uniform State Laws.

With our modern civilization and juridical proceedings rapidly coming more intensely complex, the advent of the declaratory judgment should be welcomed; it should clarify legal or equitable uncertainties as to procedure, render more simple the solution of important litigation and prevent irreparable damage or loss, unnecessarily sustained, render courts more efficient, and save useless expense and loss of time and effort on the part of litigants and their counsel.

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[18]Nashville, C. & St. L. Ry. Co. v. Wallace, 288 U. S. 249, 77 L. ed. 730, 87 A. L. R. 1191 (1932).

[19]Uniform Declaratory Judgments Act.—Section 1. SCOPE. Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either

affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

Sec. 2. POWER TO CONSTRUE. Any person interested under a deed, will, written contract, or other writings constituting a contract, or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, conract, or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

Sec. 3. BEFORE BREACH. A contract may be construed either before or after there has been a breach thereof.

Sec. 4. EXECUTOR. Any person interested as or through an executor, administrator, trustee, guardian, or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto.

(a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin, or others; or

(b) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or

(c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings.

Sec. 5. ENUMERATION NOT EXCLUSIVE. The enumeration in sections 2, 3, and 4 does not limit or restrict the exercise of the general powers conferred in section 1, in any proceeding where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty.

Sec. 6. DISCRETIONARY. The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceedings.

Sec. 7. REVIEW. All orders, judgments, and decrees under this act may be reviewed as other orders, judgments, and decrees.

Sec. 8. SUPPLEMENTAL RELIEF. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

Sec. 9. JURY TRIAL. When a proceeding under this act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

Sec. 10. COSTS. In any proceeding under this act the court may make such award of costs as may seem equitable and just.

Sec. 11. PARTIES. When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance, or franchise is alleged to be unconstitutional, the attorney-general of the state shall also be served with a copy of the proceeding and be entitled to be heard.

Sec. 12. CONSTRUCTION. This act is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered.

Sec. 13. WORDS CONSTRUED. The word "person" wherever used in this act, shall be construed to mean any person, partnership, joint stock company, unincorporated association or society, or municipal or other corporation of any character whatsover.

Sec. 14. PROVISIONS SEVERABLE. The several sections and provisions of this act, except sections 1 and 2, are hereby declared independent and severable, and the invalidity, if any, of any part or feature thereof shall not affect or render the remainder of the act invalid or inoperative.

Sec. 15. UNIFORMITY OF INTERPRETATION. This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees.

Sec. 16. SHORT TITLE. This act may be cited as the Uniform Declaratory Judgments Act.

Sec. 17. TIME OF TAKING EFFECT. This act shall take effect (.....).

NEW LAWS OF THE ROAD

J. N. Flowers*

Washington has taken cognizance of motor traffic on the highways. The traffic has been there for several years. It has grown to such volume as to demand this 1935 Congressional recognition. It is now on the official list of matters of national concern. This national recognition and official listing make their appearance through the Motor Carrier Act of 1935, approved August 8th.

No recent Act of Congress will have more ramifying or lasting consequences than the Motor Carrier Act of 1935. Some incident of the enforcement of it will touch every person who uses the highways, and every state will, in due time, have to frame its statutes to make them harmonize with federal regulations. In every locality state and federal vigilantes will be watching the same highways and enforcing rules as to the use of them. But if the rules clash the state rules must yield. The federal law is supreme.

It is not only the interstate truck and bus operators subject to direct regulation that will be affected by the enforcement of the Act. All users of the highways will at last be affected. It has been estimated that the capacity of the motor vehicles of the United States is sufficient for every man, woman, and child in the country to be taking a ride on the highways at the same time. The citizen who does no thinking about rates should have an alert interest in safety regulations, state and federal. He does not know when he may be one of the one hundred selected by chance for each day's fatalities upon the highways or one of the 3,000 selected each day by the same blind chance for physical injury.

The importance of the Act, as viewed by the public, is indicated by the volumes written about it while it is less than a year old, and its importance, as viewed by the Congress, is indicated by its being made Part II of the entrenched Interstate Commerce Act and by the delegation of the authority to enforce it to the Interstate Commerce Commission. That Commission is a governmental agency that has the confidence of the public. Its fairness and efficiency have not been seriously questioned from any quarter. It regulates

*Member of the Jackson, Mississippi, Bar.

rail carriers. It is logical to place the jurisdiction over highway transportation in the same body that makes the rules for transportation by railroad. This is not a temporary or "emergency" act; it may be expected to grow and multiply. When representatives of the Government enter a new territory by authority of the Congress they stay and others come. They do not retreat.

The purpose of the statute is to assimilate this new activity in which improved highways and motor vehicles are used as part of the transportation system of the country. That activity came into being when there were no laws giving it due recognition. It was not anticipated by legislatures. Congress declares its policy to be "to recognize and preserve the inherent advantages of, and foster sound economic conditions in, such transportation," all in the public interest. The legislation is the exercise of power vested in the Congress by the famous commerce clause of the constitution. That clause is sufficient to sustain the statute as one extending the domain of federal control to interstate transportation over the highways. The statute is carefully drawn. There seems to be no move from any quarter to contest it. It is accepted as a valid assertion of power possessed by Congress.

It is to be emphasized that it is not the character of the highway, as state or federal, improved or otherwise, but the character of the traffic that supports federal jurisdiction. The act applies to all interstate transportation of passengers and freight by motor vehicles on the highway.

The statement is general but accurate that the purpose of the lawmakers was to assimilate this new and disturbing activity as a part of our economic order. It has "inherent advantages." Up to this time it has been running wild. Heretofore a person about to engage in the business of a carrier on the highways needed only to comply with the local statutes, if any. Persons now desiring to enter into the business of a common carrier will have to apply to the Interstate Commerce Commission for a certificate of public convenience and necessity if they desire to carry any interstate traffic. And an operator cannot avoid the necessity for such a certificate merely by confining his operation to one state: he would also have to confine himself to traffic that had its route and its origin and destination points all within the state. He could not carry for any distance traffic that was on its way to or from a point in another state, it matters not how many other carriers might participate in the total, continuous movement.

The Commission is vested with authority to regulate highway common carriers of freight or passengers, engaged in interstate commerce, with respect to their charges. Such carriers will be required to establish and observe just and reasonable rates not only for the service rendered by them but for the through service in which they participate and to establish reasonable regulations and practices for the services related to the transportation, such as the caring for personal, sample and excess baggage. Tariffs of charges are required to be filed with the Commission just as railroad tariffs are required to be filed. Motor carriers are forbidden, under penalty, to make or give any undue preference or advantage to any person port or locality, or description of traffic. Tariffs shall be kept accessible to public inspection and published, filed and posted in such manner as shall be prescribed by the Commission. And no such carrier can receive, charge, or collect any compensation except that set forth in its published tariffs. And the Commission is given power, upon proper application or complaint, to revise, alter, or condemn any tariff filed. In carrying out the declared policy of the Act the Commission will concern itself as much with charges that are too low as it does with charges that are too high. It is deemed inimical to the public interest for a public carrier to do business on an unsound basis. Carriers operating on a sound basis should not have their business broken up or whittled away by other operators who use their capital instead of earnings to pay the cost of operation. Unless remunerative charges are made for the services performed the operator can continue only for a time. It is to the interest of the public that every legitimate business shall pay its way with its earnings. No charge for services is reasonable unless it amounts to as much as the expense incident to the performance of the service. Not only is it the duty of the Commission to inquire whether the applicant for a certificate to engage in the business is able and willing to finance the enterprise but it is also the duty of the Commission to see to it that he makes such charges for the service rendered as will cover the reasonable cost of performing the service, including labor, supervision, taxes, maintenance, advertising, depreciation, solicitation, and damages to persons and property.

The Commission is also given authority to regulate interstate transportation where the carrier owns the goods being transported or the service is being performed by a "contract carrier."

The enforcement of the Motor Carrier Act will call for an organization at Washington as large perhaps, as is required for the

regulation of the railroads; and because of the greater number of motor carriers and the great number of highways used by them, the field and local investigators, examiners, and attorneys engaged by the Commission for the enforcement of this Act will be a larger force than that heretofore employed to carry out the provisions of the Interstate Commerce Act. The number of employees and representatives of the Commission will perhaps be more than doubled.

The exercise by the Commission of the specific powers above mentioned will convert interstate transportation on the highways into a more dependable public service, but if the regulation is confined solely to the *conduct of the interstate operators,* other users of the road will not gain thereby to any appreciable extent. The number of vehicles engaged in interstate traffic is nominal as compared with the total number of motor cars on the highways. To subject this small number to federal regulation will not alone solve the main problem of the other users.

The big question is, how can the highways be made safe? The Motor Carrier Act of 1935 is not the answer to this question. It may be part of the answer. In fact it may be a nucleus for the answer. It may be sized up as a prophecy. The significance is not in what Congress has thus far outlined, but in the fact that something has been outlined—that the federal government has assumed a jurisdiction that requires its presence upon the highways. It may be expected that this jurisdiction will be developed to the broad, possible boundaries thereof. That development will involve incidental regulations that will affect every user of the roads over which interstate traffic moves. Congress avows its purpose to "foster" and this involves the power to promote and protect interstate commerce. It can prohibit acts and practices that endanger such commerce. It can make crimes of acts that jeopardize or impede or interfere with the orderly and safe handling of such commerce, and acts that endanger the life and limb of persons engaged in such commerce. Congress may properly prescribe conduct on the part of other users of the highways that would imperil the drivers and passengers on vehicles, the freight being carried or the vehicles themselves, or in anywise interfere with the safe and orderly movement of vehicles used in interstate commerce. The Congress, having taken notice of highway traffic, may be expected to exercise all the power it possesses over such traffic—to make it safe, to make it dependable, to protect it, to "foster" it, to curb and regulate the activities of other people in so far as such activities may obstruct or endanger

the interstate traffic. *That is the point of this article.* This is not an analysis of the Motor Carrier Act of 1935. What the writer desires to emphasize is that the federal government has entered its appearance upon the highways; that the federal government has the power, under Clause three of Section eight of Article one of the Constitution, to regulate commerce, and that the power to regulate includes the power to protect.

Since it is a regulation of interstate commerce, and since regulation includes promotion and protection, Congress may extend the authority of its regulating machinery to every condition, practice, or activity whose presence, or the likelihood of whose presence, may affect the safe and orderly use of the highways by interstate carriers. Congress may authorize the promulgation of rules or it may itself prescribe the regulations. And not only may the specifications be prescribed for observance by the interstate carriers themselves, but they may be made binding upon other users of the highways, all for the purpose of making the highways safe for the interstate traffic.

The problem of regulating interstate traffic on the highways is radically different from the problem of regulating such traffic on the railroads. The vehicles that use the railroads are all amenable to one control as to the character of the vehicles, their speed, their stopping places, their passing places, their meeting places, their starting time, their arriving time, their drivers. The governmental authority undertaking to have interstate traffic on the railroads carried on safely needs to deal with but one responsible operator. Regulations are prescribed to prevent the one responsible director of the enterprise from so conducting the business as to endanger the traffic, all in the interest of the public. The Government has not found it necessary to venture far in assuming to control or regulate conduct of other members of the public that threatens or jeopardizes the safety of interstate traffic on the railroads. If the single director of the movements of the vehicles on the railroad and his agents and servants are careful, there are few dangers that can jeopardize the safety of the operation. *But on the highways no single authority directs the movements of vehicles.* Whoever goes on the highway with his vehicle, however careful he may be not to endanger the safety of others, or his own, is exposed to the dangers incident to the operation of numerous vehicles in the hands of careless, incompetent, or indifferent drivers. Therefore the use of the highway can be made safe only by the enforcement of regulations which every user must obey. The federal government cannot

properly regulate and protect interstate traffic by confining itself to the control of the practices and conduct of the persons engaged in that traffic. To protect and promote the interstate traffic on the highways the Government will find that it is necessary to assume authority to regulate the conduct of all users of the same highways.

While the federal power to regulate commerce is put to this new task and such regulation will vitally affect rates, competition, labor and methods of doing business, and will reduce the number of irresponsible carriers, these are not, this article maintains, the most important ultimate results to be anticipated. The commanding public problem is created by the experienced dangers of highway travel, the catastrophes of the road.

This problem concerns every highway user whether he drives a mule or a motor car thereon, for business or for pleasure. To take a trip on the public roads today is an adventure. The daily newspaper carries the highway casualty list for the week-end or the holiday just as it does after storms, or floods, or freezes, or after armies have met in battle. The surviving automobile users look on unperturbed just as seals and penguins do while the slaughter of the innocent is going on around them. Nevertheless, it is true that all of us would like to see the roads made safe for our use.

The federal government has the power; it has now begun the exercise it. It has more power than it has definitely asserted in this Act. It will draw upon its reserve to complete its control of all the traffic on the highways where interstate carriers operate.

STATE BAR SECTION

GRADING OUR SUPREME COURT

In a recent article[1] Dean John H. Wigmore put before the American Bar a tentative method of grading our State Supreme Courts. Under this proposed system of grading, our Mississippi Supreme Court was graded in the highest group, and rated tenth in the United States. The courts of all the states, with the exception of California and Nevada, are considered in this rating.

Dean Wigmore's grading is based on Evidence opinions of the courts considered. The decisions upon which his rating is based were handed down by these courts from 1925 to 1932 inclusive. These decisions were graded on the basis of five qualities. As set forth by Dean Wigmore, these qualities are:

> "I. *Intelligence, i. e., intelligent grasp of the principles of law involved, and careful reasoning in their application.* This of course is the principal quality of merit in a judicial opinion.
>
> "II. *Style, i. e., finish of style of exposition*—lucid but concise; consecutive in thought, and not casual and disjointed; plain announcement of the principle invoked, not a mere enumeration of cases, nor a catalogue of counsel's points answered, nor a statement of facts without definite principles. This quality is not easy to define.
>
> "III. *Liberality, i. e.,* readiness to take the progressive view when the issues call for it—not a mere adherence to outworn shibboleths or technical orthodoxy.
>
> "IV. *Learning.* This quality though a mark of a great judge, can seldom be appraised by the reader of the opinion, for he can hardly know whether the learning exhibited in the opinion was merely borrowed from one of the briefs. Hence this quality has cut only a small figure in the present appraisal.
>
> "V. *Expert Wisdom, i. e.,* intelligent and sympathetic vision of the background of the whole case . . .
>
> "In Evidence, this quality calls for a perception that the ascertainment of the truth, within the limits of jury trial and human nature, is the objective. . . ."

The method of appraisal of individual opinions as set forth by him is as follows:

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[1]"Grading Our State Supreme Courts: A Tentative Method" (1936) 22 A. B. A. J. 227.

"(1) Opinions were appraised in four grades—1, 2, 3, 4. All opinions were started at 2, i. e., as of average ability. . . .

"An opinion noticeable as superior was marked 3; a remarkably excellent one as 4; a lamentably poor one as 1. . . .

"(2) If an opinion graded high in more than one of the basic five qualities, it was separately credited with each quality.

"(3) The judge's name was recorded; so that the original tally shows the number of points for each judge by name.

"(4) To appraise the excellence of a particular Court (when the tally for the eight years was completed), all the points 3 and 4 were added. The points 1 were deducted. . . . Thus, the score of a certain court would read (using letters to make the individual judges anonymous):

	Qualities								
Judge	I		II		III		IV	V	Total
P	4	3	4	3	..	..	..	..	..
Q	4	..	..	..	..	3	..	..	..
R	..	3	..	..	..	3	..	..	..
S	..	..	..	..	4	..	..	..	..
T	4	..	..	..	..	..	..	..	..
U	..	3	..	..	4	..	..	..	..
Total 4s points	12	..	4	..	8	..	..	..	24
Total 3s points	..	9	..	3	..	9*	..	..	21
Grand Total									45

"2. *Computation of the Ratio of Excellence.*

(1) The foregoing total (e. g., 45) thus represented the total points of special excellence emerging from all the Evidence opinions of a particular Court in that period.

(2) The ratio between that figure and the total average points attainable by all Evidence opinions would thus be the co-efficient of special excellence for this Court. Now as the other Evidence opinions were all graded at 2, and as in each opinion there were five qualities, the average points for each such opinion were 10; and the total average points would be 10 times the total Evidence opinions. For example, if in that Court 256 Evidence opinions had been rendered, the total average points would be 2560.

(3) Thus the ratio of special excellence for that Court would

*Evidently a 3 was inadvertently omitted from this column.

be the ratio of total points of special excellence to total average points; in the above instance this would be the ratio of 45 to 2560, or 1 to 57. In other words, for every 57 Evidence opinions, there was 1 point of special excellence. And so on for the other Courts."

Since, due to the fact that intermediate appellate courts eliminate a number of evidence questions in some states, the opportunities for scoring excellence in the Supreme Courts vary somewhat, and because of this and several other factors, Dean Wigmore divides the courts graded up into five groups as follows:

"Group I: Ratios between 1-1 and 1-20.

"Group II: Ratios between 1-21 and 1-30.

"Group III: Ratios between 1-31 and 1-50.

"Group IV: Ratios above 1-50."

Under this novel system of grading, the Mississippi Supreme Court, with one hundred of its Evidence opinions considered, had a ratio of 1 to 10.4, and so was placed in the first group, along with eighteen other states. Chief Justice Smith of our court was mentioned as one of twenty-one judges who had taken best advantage of frequent opportunities to make valuable contributions to their opinions. The conclusions reached by Dean Wigmore are a compliment both to our court and to Judge Smith.

Dean Wigmore concedes, however, that there is a possibility of error creeping into this method, and cites the fact that the Massachusetts Court is rated in the third group as a possible indication that there is error in his grouping.

Dean Wigmore is lauditory of the state supreme courts in the United States as a whole, but takes advantage of his opportunity to point out that there is a great amount of repetition of settled rules in the opinions of these courts, due, according to him, to the constant change of the personnel of such courts.

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NOTE AND COMMENT

CONSTITUTIONAL LAW—IMMUNITY OF A STATE FROM SUIT BY A FOREIGN STATE—DEFAULTED STATE BONDS

The decision by the United States Supreme Court[1] that the Principality of Monaco could not maintain an action against the State of Mississippi to recover on certain hundred-year old bonds is of interest as settling a point not before determined in United States constitutional law and as closing the door upon the latest and perhaps the last possible attempt to collect by judicial action upon the so-called defaulted State bonds. The history of these actions may be briefly reviewed.[2] It will be remembered that the eleven seceding states, to obtain money to carry on the Civil War, floated bond issues payable if and when the Confederacy should be successfully established as an independent Republic. Purchasers of these bonds in England and on the Continent understood of course that they were investing in a highly speculative enterprise, paid prices that fluctuated with the varying fortunes of the armies in the field but were always materially below the par value of the bonds, and finally saw the whole structure of their hopes come tumbling to the ground with the surrender of General Lee on April 9, 1865. In accordance with an established principle of international law, the Union refused to recognize or accept in any manner responsibility for the bonds whose purpose was and whose proceeds had been devoted to the support of the war against it. Not only was this refusal embodied in the Constitution, by Section four of the Fourteenth Amendment, adopted in 1868, which provides that:

> "Neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void."

but Congress demanded as a condition precedent to the readmittance of the seceding States one by one, as they became reorganized, into the Union, that each new State Constitution embody explicitly the same provision. In the face of this clearly enunciated and thus doubly enacted policy there has been no subsequent effort to collect either by judicial action or appeal to the National or State legislatures upon any of the bonds issue directly or indirectly to aid in carrying on the War.

In the Reconstruction Period when the seceding States were being rebuilt, governed at first as Military Departments, then by protected

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[1] Monaco v. Mississippi, 292 U. S. 313, 78 L. Ed. 1282, 54 Sup. Ct. 745 (1934); (1934) 7 Miss. L. J. 134; (1934) 48 Harv. L. Rev. 137; 28 Am. J. Int. L. 739.

[2] 22 Dunning, The American Nation, A History (1907) pp. 206-209; 6 Rhodes, History of the United States (1906) Chaps. 34, 36, 37; Garner and Lodge, The History of Nations (1906) Chaps. 35, 36.

Civil Governments theoretically chosen at elections in which the recently emancipated and then for the most part illiterate, characterless, and unmoral negroes were supposed to vote, with the utmost rascality and corruption frequently protected by federal arms, many of the venal hand-picked legislatures approved extravagant programs for internal improvement and officially lent the credit of the State to inflated and fantastic schemes, especially for railroads, levees, banks, and insurance companies. Many millions of dollars worth of bonds were floated, with payment of interest and principal guaranteed by the State, in enterprises which were necessary and in moderation probably would have been profitable and successful with the return of peace and the normal course of business growth in the Southern States, but which were expanded beyond all reason and sometimes, through the bribery of officials, without insistence upon those safeguards of protection and security, such as the actual existence and operation of a given number of miles of permanent railroad, which the authorizing legislature had in fact demanded. As the military and federal control was gradually withdrawn, northern office holders and booty hunters expelled, and government in the readmitted States returned to the hands of their permanent inhabitants, the soberer and responsible succeeding legislatures faced with bitter protest the immense State debts which the Reconstruction carpet-bagger governments had fastened upon them. By various methods, of the strictest audit, invalidating issues in which the procedure in any technicality failed to conform to the exact legislative prescription, refunding operations, compromise with owners as to the amounts of principal and reduction of interest, by laws and by prohibitive constitutional amendments, as in Arkansas, Georgia, Louisiana, Mississippi, and North Carolina, the debtor States have since been engaged in paring down or cutting off portions of their obligations. A half-dozen Northern States, without the same excuse, have occasionally fallen into similar ways. Illinois, Indiana, Maryland, Michigan, Minnesota, and Pennsylvania, as well as Tennessee and Virginia, although they have scaled down their debts, have by persistent efforts avoided any actual repudiation. Others have paid off or refunded their doubtful issues, until today there are outstanding so-called "repudiated" bonds of eight Southern States only: Alabama,[3] Arkansas,[4] Florida,[5] Georgia,[6] Louisiana,[7] Mississippi,[8] North Carolina,[9] and South Carolina.[10]

In a class distinct, however, from either the prohibited Civil War bonds or the minimized Reconstruction issues, were the bonds involved

[3]Fleming, Civil War and Reconstruction in Alabama (1911) pp. 587-605.

[4]Walker, Railroad Legislation and Frauds, Repudiation of Arkansas Bonds (1864).

[5]Wallace, Carpetbag Rule in Florida (1888) Chaps. 9, 11, 12, 15, 16, 19.

[6]Thompson, Reconstruction in Georgia (1915) pp. 226-254.

[7]Caldwell, A Banking History of Louisiana (1935) pp. 102-110.

[8]Garner, Reconstruction in Mississippi (1902) Chaps. VII, VIII.

[9]de Roulhac, Reconstruction in North Carolina (1914) pp. 427-451.

[10]Beattie, History of South Carolina Fraudulent Bond Issues (1929).

in the action of *Monaco v. Mississippi.* In the decade 1830-1840 business in the United States ran the cycle of prosperity incident upon the improvement of transportation facilities by the completion of canals, plank roads, and the first railroads, the growth of the West, the discovery and use of coal, the abolition of the United States Bank and a financial panic. When prosperity seemed at its height, the establishment of new banks appeared particularly easy, inviting, and profitable, and many money handling companies were launched under more or less official protection with inadequate capital, insufficient experience, and unsound principles. In particular, the Legislature of the State of Mississippi voted to pledge the State's credit to issues of bonds by the Planters Bank in 1833 for $2,000,000 and by the Union Bank in 1838 for $5,000,000. Following the panic of 1837 both Banks got into difficulties and finally suspended, with interest on their bonds paid only to about 1840. The bonds had been taken in large blocks at heavy discounts by groups of bankers, particularly in New York, and sold at a handsome profit as usual to private investors, especially in England and to some extent on the Continent, helped materially by the *prima facie* pledge of the State's credit back of them. After the closing of the two banks, various holders of the bonds from time to time made attempts to get payment, in whole or in part, by appeals to the Legislature, to the public conscience, honor and good faith of the people of the State, and to the State Courts, all equally without practical success. One suit[11] resulted in a declaration by the Mississippi Supreme Court that the Union Bank bonds were validly issued, a just obligation of the State, and should be paid; but the judgment could not be executed, and the successful plaintiff or his representatives never collected one cent, for the State administrative and executive officials delayed, evaded, and postponed the claim, until eventually payment was expressly forbidden by a constitutional amendment adopted November 2, 1875,[12] and continued in the Mississippi Constitution of 1890.[13]

The United States Constitution as originally adopted provided (Art. III, Sec. 2) that

> "The judicial power shall extend . . . to controversies between two or more States; . . . and between a State, or the citizens thereof, and foreign states, citizens or subjects. In all cases . . . in which a State shall be party, the Supreme Court shall have original jurisdiction."

The advocates of states' rights and local autonomy in government, who purported vehemently to fear too much federal interference, brought about the adoption in 1798 of the Eleventh Amendment,[14] providing that

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[11]Johnson v. State of Mississippi, 25 Miss. 625 (1853).

[12]Miss. Const. 1869, Art. 12, § 5, No. 1.

[13]Art. 14, § 258. The vote for the prohibition was 84 to 5 in the Constitutional Convention.

[14]Following the unexpected decision in Chisholm v. Georgia, 2 Dall. 419, 1 L. Ed. 440 (1793). See Hans v. Louisiana, 134 U. S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890).

> "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against any of the United States by citizens of another State, or by citizens or subjects of any foreign state."

State courts always retained jurisdiction of suits against the State by its own citizens, and the Eleventh Amendment further restricts to the State courts jurisdiction of actions against any State by private individuals, whether citizens of other States of the Union or of foreign nations; so that of all possible suits against one of the United States there is left to the original jurisdiction of the United States Supreme Court only those actions brought by a sister State or by a foreign nation.[15] Thus prevented from bringing actions in their own names on the defaulted State bonds, the bondholders have tried the other alternatives which seemed to be left open to them, and have now failed in both cases. Some of the owners of defaulted Louisiana State bonds about 1878 offered a certain number of the bonds, under arrangements or agreements not made public, to the Northern States of New Hampshire and New York, who each, under permissive acts of their Legislatures requiring that no liability or expense should attach to the State as the result of any action taken, accepted the bonds and brought suit on them against the State of Louisiana. The United States Supreme Court[16] said that the transaction was a mere device for evading the Eleventh Amendment, and that a State could not create a controversy with another State by assuming prosecution of debts owing by the other State to citizens of the former State; so that attempt to collect on the bonds through the aid of other States of the Union wholly failed. Some of the owners of defaulted North Carolina State bonds about 1916, apparently through a Committee of the London Corporation of Foreign Bond Holders,[17] presented some of their bonds to the Department of Public Health and Charities of the Republic of Cuba; and that Department, after due authorization by Presidential Decree, appointed an attorney and on November 6, 1916 filed a petition preliminary to a suit against the State of North Carolina in the United States Supreme Court. Before any action by the Court, however, something induced a change of heart in the Cuban officials, the authorization was revoked and the suit withdrawn on January 8, 1917[18] (followed by a joint resolution of thanks by the Legislature of North Carolina to the Republic of Cuba), so that there was no decision. No further efforts reached the stage of court proceedings until the Monaco action.

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[15]Cohen v. Virginia, 6 Wheaton 264 (1821).

[16]New Hampshire v. Louisiana, New York v. Louisiana, 108 U. S. 76, 27 L. Ed. 656 (1883).

[17]Corporation of Foreign Bondholders, London; Annual Reports.

[18]Cuba v. North Carolina, 242 U. S. 665, 61 L. Ed. 551, 37 Sup. Ct. 249 (1917); Presidential Decrees, No. 1438, July 24, 1916; No. 5, Jan. 4, 1917. 26 AMER. INT. LAW SUPP. 679.

On September 26, 1933 three persons[19] apparently not citizens of the United States, evidently as the result of previous negotiations, gave to the Principality of Monaco, at its Paris Legation, for the free use of its Treasury or charity, bonds to a total face value of $100,000 of the Planters Bank and both issues of the Union Bank of Mississippi, which with unpaid interest coupons at 5% and 6% represented in all a claim of $574,300. New York attorneys for Monaco filed with the United States Supreme Court on December 18, 1933 a motion for leave to file a declaration in a suit on such bonds and coupons against the State of Mississippi, with a copy of the proposed declaration and a brief in support of the application. On January 8, 1934 a routine order of the Court was made directing the defendant State to answer and show cause why the plaintiff's application to start suit should not be granted; a brief in opposition was filed by Mississippi, a reply by the plaintiff, and after oral argument on March 5, a supplemental reply by the plaintiff on March 9; upon all of which the Supreme Court duly deliberated and handed down its decision on May 21, 1934. Mississippi in objection to the suit urged that Monaco was not an independent sovereign, because of the Treaty of July 17, 1918 with France,[20] and therefore not a foreign state within the meaning of Article III, Section two of the United States Constitution; that she had not consented to the suit by Monaco and could not be sued without having given such consent; and that prescription had run against both principal and interest of these bonds, notwithstanding the prohibition against payment of them in the Mississippi Constitution since 1876. The Supreme Court left aside without deciding, as unnecessary, all questions except that as to the consent of the State to be sued; and on that alone, which curiously enough had not previously been determined in any of the suits against States hitherto decided by the Supreme Court, declared that the suit could not be maintained. The opinion points out that the waiver of consent on the part of a State which inheres in the acceptance by the several States of the United States Constitution runs only to the other States also under that Constitution, and not to outside foreign states or nations not within the structure of the Union. As to suits by such foreign states, the States of the Union retain the immunity from action which pertains to every sovereign nation in international law. It would seem to follow that any foreign state enjoys a similar immunity and cannot without her consent be sued by any State of the United States.

As it is extremely unlikely that the Legislatures of any of the States having outstanding bonds in default will give express consent

[19]Hon. Mary Euphemia Elliot of London; Dudley Churchill Majoribanks, Baron Tweedmouth, of London; and Giovanni del Drago of New York.

[20]Nouveau Recueil General de Traites; Martens, Leipzig, 1923; 3e Ser., Tome XI, pp. 313-315. 111 British and Foreign State Papers 727-728.

that the State may be sued on such bonds, this decision would seem to terminate definitely the last possible chance of the bondholders to maintain as of legal right action in any court upon these old obligations. The federal government of the United States is entrusted broadly with all foreign relations and negotiations, to the exclusion of any international action or power whatsoever by any of the individual States; while within the Union the United States government has no power to compel a State to meet its obligations to which the United States is not a party[21] or in a controversy not justiciable in the federal courts.[22] In this paralyzation of the use of judicial force, and the co-existing bar upon direct transactions between the prima facie debtor and foreign creditors, it is to be hoped, as several text-writers have suggested,[23] that multipartite negotiations among the debtor States, the United States Government and the bondholders may eventually result, perhaps by means of shared public appropriations met by reasonable reduction of claims for a settlement reasonably satisfactory to all, in belated justice which shall wipe out forever the stain of unredeemed equitable obligations.

GORDON IRELAND.*

CONFLICT OF LAWS — FOREIGN DIVORCE JURISDICTION — FULL FAITH AND CREDIT.

Husband and wife were domiciled in Vicksburg, Mississippi. Husband, after grossly mistreating his wife in respect of his licentious conduct with other women, wrongfully left her and obtained a divorce in Arkansas, based on constructive service. Wife sued in Mississippi for divorce and alimony. *Held:* Husband's divorce

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[21]United States v. North Carolina, 136 U. S. 211, 34 L. Ed. 336, 10 Sup. Ct. 920 (1890); South Dakota v. North Carolina, 192 U. S. 286, 48 L. Ed. 448, 24 Sup. Ct. 269 (1903).

[22]Virginia v. West Virginia, 246 U. S. 565, 62 L. Ed. 883, 38 Sup. Ct. 400 (1918).

[23]Curtis, *Debts of the States* (1844) 58 NORTH AMER. REVIEW 109; Johnson, *Can States be Compelled to Pay Their Debts?* (1878) 12 AMER. LAW REVIEW 625; Lippitt, *State Repudiation in the U. S. Supreme Court* (1883) 14 INTER. REVIEW 325; Hume, *Are We A Nation of Rascals?* (1884) 139 NORTH AMER. REVIEW 127, 563; Scott, *Repudiation of State Debts* (1893) No. 2 Library of Economics and Politics, Richard T. Ely, Editor, New York and Boston; *State Bonds: Statements by the Governors of Arkansas, Georgia, North Carolina, and Virginia* (1926) 23 Current History 475; Hamilton, *Those Southern Repudiated Bonds* (1927) 3 VIRGINIA QUARTERLY REVIEW 490; Howland, *Our Repudiated State Debts* (1928) 6 FOREIGN AFFAIRS 395; Randolph, *Foreign Bondholders and the Repudiated Debts of the Southern States* (1931) 25 AMER. J. INT. LAW 63-82.

*Professor of Law, Louisiana State University.

obtained in Arkansas not entitled to full faith and credit under Article 4, Section 1 of the United States Constitution, nor will it be recognized on the basis of comity because:

(1) Husband was not a *bona fide* resident of Arkansas;

(2) Husband had no *animus manendi* as to his temporary residence there;

(3) There was no conduct of wife to justify his establishing a constructive domicile for her in Arkansas;

(4) Recognition of such a foreign divorce would be against the public policy of this state in view of Section 1415 and Section 1416 of the Code of 1930, which requires that residence for purpose of jurisdiction in divorce cases be *bona fide.*

Decree in favor of wife for a divorce and $30,000 alimony. *Miller v. Miller,* ..Miss. .., 159 So. 112 (1935).

In so holding, the instant case cited and followed the famous United States Supreme Court case of *Haddock v. Haddock,*[1] which is now undisputably the law in this country. It is notable that, although the instant case is apparently a case of first impression in this state, the court did not discuss *pro* or *con* the merits of the *Haddock case*—notable because the latter was a five to four decision, giving rise to a galaxy of adverse criticism within the thirty years since it was decided; and especially notable because the great majority of state courts have continued to give full faith and credit to foreign divorce decrees, at least where the husband is not at fault,[2] though not required to do so. Some of these courts do so expressly on the ground that the full faith and credit clause of the Constitution requires them to do so, disagreeing with the decision of the *Haddock case.*[3] Other courts do so on the basis of a state statute requiring

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[1]201 U. S. 562, 50 L. Ed. 867 (1906).

[2]Wynne v. Wynne, 254 Ill. App. 254 (1930); Taylor v. Taylor, 64 Fla. 52, 60 So. 116 (1912); Gildersleeve v. Gildersleeve, 88 Conn. 689, 92 Atl. 684, Ann. Cas. 1916B 920 (1914); Holdorf v. Holdorf, 198 Iowa 158, 197 N. W. 262 (1924); Miller v. Miller, 200 Iowa 1193, 206 N. W. 262 (1925); Butler v. Bolinger, 133 So. 778 (La. 1930); Lepenser v. Griffin, 146 La. 584, 83 So. 839 (1919); Hanna v. Hanna, 32 S. W. (2d) 125 (Mo. 1930); Harvey v. Harvey, 240 S. W. 450 (Mo. 1922); Johnson v. Johnson, 149 La. 89, 88 So. 698 (1921); Hicks v. Hicks, 69 Wash. 627, 125 Pac. 945 (1912). See also Note 39 A. L. R. 603 (1925); 86 A. L. R. 1329 (1933).

[3]Way v. Way, 132 S. C. 288, 128 S. E. 705 (1925); Scheper v. Scheper, 125 S. C. 89, 118 S. E. 178 (1923); Caswell v. Caswell, 84 W. Va. 575, 100 S. E. 482 (1919); Stone v. Stone, 113 S. W. 1157 (Mo. App. 1908); Stuart v. Cole, 42 Tex. Civ. App. 478, 92 S. W. 1040 (1906); Ditson v. Ditson, 4 R. I. 287 (1856) (leading case, an excellent criticism of the theory of the Haddock case).

that such faith and credit be given where the residence established in the foreign domicile was *bona fide*.[4] Then, of course, most courts give such credit now on the basis of comity where the foreign domicile was *bona fide*.[5] In the main, therefore, those courts which felt constrained to give credit to the foreign decree have continued to do so. Justice White, in the *Haddock case* was influenced to adopt what was at that time a distinct minority holding, voiced chiefly by the New York courts. These courts have always taken the exceptional view that an *ex parte* divorce at the new domicile does not affect the status of the spouse who remains in New York. In other words, the New York courts adopt the view apparently voiced by Justice White in the *Haddock case* that, conceding that divorce is an *in rem* proceeding, the *res* is nevertheless divisible. The leading case adopting this fiction that the *res* exists in the territory of the domicile is that of *People v. Baker*.[6] A few other states followed this view in order to prevent abuse and to protect their own citizens.[7] There are a great many cases (decided on the basis of fault) which hold that a divorce obtained at the "matrimonial domicile" is entitled to full faith and credit.[8] This was the holding in the famous case of *Atherton v. Atherton*,[9] decided by the United States Supreme Court. There are a few recent New York cases which hold that, in cases in which a divorce is obtained in the foreign "matrimonial domicile" it will be

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[4]Lister v. Lister, 86 N. J. Eq. 30, 97 Atl. 170 (1916); Ballentine v. Ballentine, 112 N. J. Eq. 222, 104 Atl. 5 (1933); Kenner v. Kenner, 139 Tenn. 211, 201 S. W. 779, L. R. A. 1918E 587 (1918); Humphrey v. Humphrey, 139 Va. 146, 123 S. E. 554 (1924); Wear v. Wear, 130 Kan. 205, 285 Pac. 606 (1930).

[5]Hampton v. McConnell, 3 Wheat. 234, 4 L. Ed. 378 (1820); Faris v. Hope, 298 Fed. 727 (C. C. A. Mo. 1924); Searles v. Searles, 140 Minn. 385, 168 N. W. 133 (1918); Joyner v. Joyner, 131 Ga. 221, 62 S. E. 183, 127 Am. St. Rep. 220, 18 L. R. A. (N. S.) 647 (1908); Snyder v. Buckeye Building & Loan Assn., 160 N. E. 37 (Ohio 1928).

[6]76 N. Y. 78, 32 Am. Rep. 274 (1879); See also Ackerman v. Ackerman, 200 N. Y. 72, 93 N. E. 192 (1910); Williams v. Williams, 130 N. Y. 193, 29 N. E. 98, 27 Am. St. Rep. 517, 14 L. R. A. 220 (1891); Odea v. Odea, 101 N. Y. 23, 4 N. E. 110 (1885); Ransom v. Ransom, 109 N. Y. S. 1143, 125 App. Div. 915 (1908).

[7]Arrington v. Arrington, 102 N. C. 491, 9 S. E. 200 (1889); Cook v. Cook, 56 Wis. 195, 14 N. W. 43, 43 Am. Rep. 706 (1882); Colvin v. Reed, 55 Pa. 375 (1867); Duncan v. Duncan, 265 Pa. 464, 109 Atl. 220 (1920); In Re Grossman's Estate, 263 Pa. 139, 106 Atl. 86 (1919).

[8]Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794 (1901), a case in which the wife unjustifiably abandoned the matrimonial domicile in Kentucky and went to New York. A decree obtained by the husband in Kentucky by constructive service was held entitled to full faith and credit in New York.

[9]Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794 (1901); Perkins v. Perkins, 225 Mass. 82, 113 N. E. 841; Thompson v. Thompson, 89 N. J. Eq. 70, 102 Atl. 856 (1918); Thompson v. Thompson, 226 U. S. 551, 33 S. Ct. 129, 57 L. Ed. 347 (1913) (on facts similar to those in the Atherton case); State v. Duncan, 110 S. C. 253, 96 S. E. 294 (1918); Snyder v. Buckeye Bldg. and Loan Assn., 160 N. E. 37 (Ohio 1928); De Kraft v.

given full faith and credit in New York, even against a resident of that state.[10]

A difficult problem is presented in determining what is meant by the term "matrimonial domicile." If there can be only one "matrimonial domicile," then only a divorce obtained at that domicile is entitled to full faith and credit in other states.[11] But with the growth of modern freedom of women and the consequent allowance of married women to establish separate domiciles under some circumstances,[12] it was conceded that the *res* could be divided. However, this was not thought to affect the original *in rem* concept of divorce jurisdiction; it only meant that there were two courts competent to exercise jurisdiction over it, and a divorce granted at either place was valid,[13] and, it seems, until the *Haddock case* was decided, entitled to full faith and credit in other states.[14] Certainly it is settled that a divorce obtained by the wife at a separate domicile acquired by necessity or the fault of the husband is entitled to full faith and credit in other states.[15] The reason of the law is the theory of the state's interest in the *res* and its inherent right to regulate the marital status of its citizens, and to dissolve that status although no actual notice be given to the other party.[16] Conceding that this view may lead to abuse, certainly the Supreme Court case of *Maynard v. Hill*[17] firmly establishes the *in rem* theory of divorce jurisdiction; a few

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Barney, 60 D. C. 361, 2 Haw. & H. 405, Fed. Cas. No. 18, 288 (1862); Commonwealth v. Booth, 165 N. E. 29 (Mass. 1929); Freet v. Holdorf, 216 N. W. 619 (Iowa 1928); Williams v. Williams, 130 N. Y. 193, 29 N. E. 98, 27 Am. St. Rep. 517 (1891); Davis v. Davis, 22 N. Y. S. 191, 2 Misc. Rep. 549 (1893); Loose v. Loose, 10 Phila. 453 (Pa. 1893); Commonwealth v. Steiger, 12 Pa. Co. Ct. Rep. 334 (1892); Herron v. Passailaigue, 110 So. 539 (Fla. 1928).

[10]Dodge v. Campbell, 220 N. Y. S. 262, 128 Misc. Rep. 778 (1927); Blair v. Blair, 220 N. Y. S. 372, 129 Misc. Rep. 159 (1927); Boissevain v. Boissevain, 220 N. Y. S. 579, 129 Misc. Rep. 5 (1927).

[11]In Re Radinovita's Estate, 299 Pa. 264, 149 Atl. 317 (1930); In Re Hoffner's Estate, 254 N. Y. 283, 172 N. E. 483 (1930); In Re Bennett's Estate, 238 N. Y. 372, 123 Misc. Rep. 486 (1930). Contra: Where divorce not obtained at matrimonial domicile was given full faith and credit, Keena v. Keena, 10 S. W. (2d) 344 (Mo. App. 1928).

[12]Cheever v. Wilson, 9 Wall. 108 (U. S. 1869); GOODRICH, CONFLICT OF LAWS (1927) 44.

[13]Leflar, *Jurisdiction to Grant Divorces* (1935) 7 MISS. L. J. 446; Thompson v. Thompson, 91 Ala. 591, 8 So. 419, 11 L. R. A. 443 (1890); Rodgers v. Rodgers, 56 Kan. 483, 43 Pac. 779 (1896); Shafer v. Bushnell, 24 Wis. 372 (1869); In Re Benton's Succession, 106 La. 494, 31 So. 123, 59 L. R. A. 135 (1901); GOODRICH, CONFLICT OF LAWS (1927) 296.

[14]Ditson v. Ditson, 4 R. I. 287 (1856).

[15]Cheever v. Wilson, 9 Wall. 108 (U. S. 1869). In Re Succession of Benton, 106 La. 494, 31 So. 123, 59 L. R. A. 135 (1901); Shaw v. Shaw, 98 Mass. 158 (1867); Turner v. Turner, 44 Ala. 437 (1870); Moffatt v. Moffatt, 5 Cal. 280 (1855); State v. Goodrich, 14 W. Va. 834 (1878); Buckley v. Buckley, 50 Wash. 213, 96 Pac. 1079, 126 Am. St. Rep. 900 (1908); 2 BISHOP, MARRIAGE AND DIVORCE (6th Ed.) § 128-155 *et seq.*

[16]Maynard v. Hill, 125 U. S. 190, 31 L. Ed. 654, 58 Sup. Ct. 723 (1888).

[17]*Ibid.*

modern cases hold to the contrary however.[18] The only question would seem to be whether the *res* is divisible and, if so, whether a divorce obtained where the *res* has been split will be entitled to full faith and credit.

Those states which base their recognition purely on grounds of comity usually adopt one or more of the following considerations as a test:

(1) Whether the ground recognized by the divorce forum is also recognized as a cause for divorce in the latter state.[19]

(2) Whether the defendant was a resident of the latter state, of a third state, or of a foreign country. (The argument of refusing recognition on the ground of public policy applying only in protection of the state's own citizens.)[20]

(3) Whether the defendant actually knew of the suit.[21]

(4) Whether the foreign divorce contravenes the public policy or injures the citizens of the latter state.[22]

Assuming that the foreign decree, if valid, will be recognized; still any jurisdictional facts may be subjected to inquiry by collateral attack, although the recital in the record shows jurisdiction.[23] Actual and *bona fide* domicile may be so subjected to inquiry as jurisdictional facts.[24] But the rule has no application to divorces of citizens of

[18]Montmorency v. Montmorency, 139 S. W. 1168 (Tex. Civ. App. 1911); Benson v. Benson, 40 Fed. (2d) 159 (U. S. D. C. of D. C. 1930); See Note 18 L. R. A. (N. S.) 647; Gould v. Gould, 235 N. Y. 14, 138 N. E. 490 (1923);

[19]Crim v. Crim, 211 Ala. 13, 99 So. 301 (1924); People v. Baker, 76 N. Y. 78, 32 Am. St. Rep. 274 (1879); Greenberg v. Greenberg, 218 N. Y. 587, 131 Misc. Rep. 867 (1879) (adultery only ground recognized).

[20]Rocco v. Rocco, 228 N. Y. S. 405, 131 Misc. Rep. 867 (1928); Ball v. Crass, 180 N. Y. S. 434, 190 App. Div. 711 (1920), where Nevada divorce against wife in Missouri was held not subject to collateral attack in New York.

[21]Davenport v. Davenport, 67 N. J. Eq. 320, 58 Atl. 535 (1904); But see Stevens v. Evans, 105 N. J. Eq. 203, 147 Atl. 447 (1928), holding that intent to evade the New Jersey statute must appear in order to preclude recognition.

[22]In Re Briggs Estate, 245 N. Y. S. 600, 138 Misc. Rep. 136 (1930). This was also one of the grounds on which the decision in the principal case was based.

[23]Hopkins v. Hopkins, 165 So. 414 (Miss. 1936) (in which an Alabama divorce was refused recognition on account of fraudulent domicile); Huntington v. Atrill, 146 U. S. 657, 13 Sup. Ct. 224, 36 L. Ed. 1123 (1892); Bell v. Bell, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. Ed. 804 (1901); Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366 (1903); Cole v. Cunningham, 133 U. S. 107, 10 Sup. Ct. 269, 33 L. Ed. 538 (1890); Hilton v. Guyot, 159 U. S. 113, 16 Sup. Ct. 139, 40 L. Ed. 95 (1894); American Express Co. v. Mullins, 212 U. S. 311, 29 Sup. Ct. 381, 53 L. Ed. 525, 15 Ann. Cas. 536 (1909); Dormitzen v. Sav. and Loan Assn., 23 Wash. 132, 62 Pac. 862, *affirmed* 192 U. S. 125, 24 Sup. Ct. 221, 48 L. Ed. 373 (1900); Givens v. Givens, 195 S. W. 877 (Tex. Civ. App. 1917); Dunham v. Dunham, 162 Ill. 587, 44 N. E. 841, 35 L. R. A. 70 (1894); Field v. Field, 215 Ill. 496, 74 N. E. 443 (1904).

[24]De Bouchel v. Candler, 296 Fed. 482 (U. S. D. C. Ga. 1924); Brugiereri v. Brugiereri, 172 Cal. 199, 155 Pac. 988 (1916); Robins v. Robins, 142 Atl. 168 (N. J. Eq. 1928); State v. Cooke, 110 Conn. 348, 148 Atl. 385 (1930); Perkins v. Perkins, 225 Mass. 82, 113 N. E. 841, L. R. A. 1917B 1028 (1916); Lister v. Lister, 86 N. J. Eq. 30, 97 Atl. 170 (1916).

other states than that in which the question arises.[25] for in such case there is said to be no reason to apply the public policy of the forum to protect a citizen of another state. The recital of jurisdiction, however, is presumptively legal and binding,[26] and it is settled that a divorce granted at the domicile of neither party will not be recognized.[27]

Such is a brief cross section of the authorities where the husband has in good faith established a separate domicile. Thus, the orthodox rule, it seems, is that the domicile of the husband is the domicile of the wife; and, by virtue of the wife's duty to be at the "matrimonial domicile" established by her husband, the law says that she is constructively domiciled at the domicile of her husband. Certainly this is true where the wife has unjustifiably left the husband,[28] or where he has in good faith established a domicile for her from which she is unjustifiably absent.[29] The wife therefore could not establish a separate domicile except from necessity or the fault of the husband.[30] It was early settled that the husband could not establish her constructive domicile where he left her in order to avoid the marital obligations.[31] But even in such case the fact that the wife had established a separate domicile did not mean that she could thereby draw the husband's domicile constructively to hers. In such case there were simply two domiciles. In other words, the rule did not work both ways. The husband can establish a constructive domicile for the wife when she is at fault, but she could not establish his constructive domicile where he was at fault.

Since "matrimonial domicile" was the real question involved in the *Haddock* and *Atherton cases,* a brief reference thereto seems proper. The accepted view was that matrimonial domicile was the domicile which the wife takes upon marriage.[32] Professors Dicey and Westlake take the view that it is the domicile of the husband at the

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[25]Ball v. Cross, 180 N. Y. S. 434, 190 App. Div. 711 (1920); Ex Parte Hilton, 213 Ala. 573, 105 So. 647 (1925); Lie v. Lie, 159 N. Y. S. 748, 96 Misc. Rep. 3 (1916); Kaufman v. Kaufman, 163 N. Y. S. 566. 177 App. Div. 562 (1917).

[26]De Bouchel v. Candler, 296 Fed. 482 (U. S. D. C. Ga. 1924); McLaughlin v. McLaughlin, 202 Ala. 16, 79 So. 354 (1918). Some courts, however, hold it conclusive. See In Re Pusey's Estate, 177 Cal. 367, 170 Fed. 846 (1918).

[27]Bell v. Bell, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. Ed. 804 (1901). But see *contra* the anomalous doctrine of Gould v. Gould, 235 N. Y. 15, 138 N. E. 480 (1923), which recognized by comity a divorce obtained in France, though neither party was domiciled there, the court evidently following the *in personam* theory.

[28]Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 40 L. Ed. 794 (1901).

[29]Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366 (1903); Bell v. Bell, 181 U. S. 175, 21 Sup. Ct. 551, 45 L. Ed. 804 (1901).

[30]Cheever v. Wilson, 9 Wall. 108 (U. S. 1869).

[31]Barber v. Barber, 21 How. 582 (U. S. 1858).

[32]Minor, Conflict of Laws § 81; Goodrich, *Matrimonial Domicile* (1918) 27 Yale L. J. 49.

time of his marriage,[33] and Professor Wharton says that it is the intended permanent residence of the parties.[34]

A discussion of these theories is not within the scope of this comment; nor is it necessary, for the term is a new one, for the purpose of divorce jurisdiction. It is not used by the textwriters in this particular but is first found in a very recent work,[35] and then only as gathered from the language of the courts in late cases. The English view is that "matrimonial domicile" for the purpose of divorce jurisdiction is "the domicile for the time being of the married parent."[36] One writer says that it is "where one party is and the other party ought to be."[37] The most widely accepted view is that it is "where the parties last lived together as husband and wife with intent to make that place their home."[38] The *Atherton case,* which has never been overruled, though probably intending and meaning to adopt this test, said that the matrimonial domicile was "where the parties resided at the time of the divorce." Justice White evidently seized upon this careless language to mean that, where the parties resided apart, the *res* was divisible—a pure fiction. It is this distinction which Justice Holmes so forcefully abhorred in his dissent in the *Haddock case.*

Doubt as to this question has not been dissolved by the *Haddock* decision. Under a restricted view of the *Atherton case,* while the wife may in some circumstances be constructively bound to the husband's domicile although she resides in another state (where she is unjustifiably absent), the husband is never constructively bound to the wife's domicile though he be at fault in leaving her. Under the Supreme Court decision in *Maynard v. Hill,*[39] every state by virtue of its inherent interest in the marriage relation can determine the status of its own citizens. Under a broader view of the *Atherton case,* the courts of the last matrimonial domicile acquire divorce jurisdiction entitled to extraterritorial recognition, even though the defendant has acquired a separate domicile.[40] In such case it would seem that a decree in favor of the husband or a decree in favor of the wife would stand on the same plane as far as the full faith and credit clause is concerned. How then, as Justice Brown pointed out in his dissent,[41] can the decree be valid in the state where rendered and yet not entitled to full faith and credit in other states?

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[33]Dicey, Conflict of Laws (2d Ed. 1908) 511; Westlake, Conflict of Laws § 40.

[34]Wharton, Conflict of Laws (3rd Ed.) § 190.

[35]9 R. C. L. 510, 512.

[36]Le Mesurier v. Le Mesurier, A. C. 517 Privy Council (1895).

[37]Peasley, *Ex Parte Divorce* (1915) 28 Harv. L. Rev. 457; See also Montmorency v. Montmorency, 139 S. W. 1168 (Tex. Civ. App. 1911).

[38]Callahan v. Callahan, 121 N. Y. S. 39, 65 Misc. Rep. 172 (1909); De Bouchel v. Candler, 296 Fed. 482 (U. S. D. C. Ga. 1924).

[39]Maynard v. Hill, 125 U. S. 190, 58 Sup. Ct. 723, 31 L. Ed. 654 (1888).

[40]North v. North, 96 N. Y. S. 1138, 47 Misc. Rep. 180 (1906), holding that the principle of the Atherton case extends to any new domicile which an abandoned spouse may afterards acquire.

[41]Haddock v. Haddock, 201 U. S. 626 (1906).

Professor Leflar, writing on the problem in this Journal,[42] took it upon himself to explain this vexatious problem[43] as academic by referring to the analogy of those cases in which the Supreme Court has held valid, in the state where rendered, decrees compelling conveyance of foreign lands[44] and yet holding that such decrees are not entitled to full faith and credit in other states.[45] The falsity of his analogy is equally academic, for the distinction is obvious. Those cases were proceedings *in personam,* while divorce decrees are proceedings *in rem.* It is perfectly clear that an *in rem* judgment respecting title to foreign lands would have been absolutely void even in the state where rendered. Furthermore, as Justice Harlan pointed out in his dissent in the *Haddock case,* it is of the very essence of *in rem* actions that the status thereby determined, if the court has jurisdiction over the subject matter, is to be recognized everywhere. Furthermore, the case of *Fall v. Eastin* merely held that to compel recognition of an *in personam* judgment as to a *res* (lands) wholly without the jurisdiction of the court would be but to do indirectly by an *in personam* proceeding what the court could not do directly by an *in rem* proceeding because of entire lack of jurisdiction over the subject matter (the foreign lands), and that such a rule would do violence to the well settled principle that the *lex rei sitae* governs as to all cases affecting title to lands. A careful analysis of these cases shows clearly that the analogy is false and that Professor Leflar's explanation is therefore unsound.

This brings us to the question of whether or not the *in rem* theory of divorce jurisdiction can prevail in the face of the *Haddock case.* At least one state court,[46] one federal judge,[47] and a recent annotator[48] incline to the view that where the husband has established a separate domicile, the *in personam* theory will be followed. They cite as authority the *Haddock case.* This confusion, it is submitted, is unfortunate though unwarranted by that case, as will be readily seen when we examine the following words[49] of Justice White, who delivered the majority opinion:

"Conceding, however, that he took . . . so much as concerned his individual status, it cannot in reason be said that he did not leave in New York so much of the relation as pertained to the wife."

He thus adopts the fiction that the *res* is divisible. Such a fiction

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[42]Leflar, *Jurisdiction to Grant Divorces* (1935) 7 Miss. L. J. 445.

[43]*Idem.* at pp. 463, 464.

[44]Matson v. Matson, 186 Iowa 607, 173 N. W. 127 (1919); Mallette v. Scheerer, 164 Wis. 415, 160 N. W. 182 (1916).

[45]Fall v. Eastin, 215 U. S. 1, 30 Sup. Ct. 3, 54 L. Ed. 65, 23 L. R. A. (N. S.) 924, 17 Ann. Cas. 853 (1909). For an excellent explanation of these decisions, see Lorenzen, *Application of Full Faith and Credit Clause to Equitable Decrees for Conveyance of Foreign Land* (1925) 34 Yale L. J. 591.

[46]Montmorency v. Montmorency, 139 S. W. 1168 (Tex. Civ. App. 1911).

[47]Benson v. Benson, 40 Fed. (2d) 159 (U. S. D. C. of D. C. 1930).

[48]See Note 18 L. R. A. (N. S.) 647; see also Gould v. Gould, 235 N. Y. 14, 138 N. E. 490 (1923).

[49]Haddock v. Haddock, 201 U. S. 577 (1906).

is expressly rejected by Justice Gray in the *Atherton case* in these words:

"The marriage tie, when thus severed as to one party, ceases to bind either. A husband without a wife or a wife without a husband is unknown to the law."[50]

So, Justice Brown, in his dissent in the *Haddock case,* finds it difficult to reconcile the willingness of the majority opinion to recognize the validity of the husband's divorce in Connecticut and the refusal to accord that decree full faith and credit in New York without an outright abandonment of the *in rem* theory, hence these decisions holding that there was such an abandonment. The most glaring error in the recognition of the *in personam* theory is that, by the constitutional test of jurisdiction[51] the decree would not be valid, even in Connecticut. Yet, to make the decree invalid in Connecticut would be expressly contrary to the decision in *Maynard v. Hill,* as heretofore pointed out. Therefore, according to the *Haddock case,* evidently the constitutional test of jurisdiction deemed necessary to satisfy the due process clause of the Fourteenth Amendment to the Constitution is not the same as that required by the full faith and credit clause, if that case meant to abandon the *in rem theory.* This writer cannot assume with the minority of courts and writers that the Supreme Court meant to take such an inconsistent position, especially in the absence of any express decision to that effect.

Since the *Haddock case* was a five to four decision, it is not at all improbable that the United States Supreme Court will abandon the idea that a judgment, *in rem* presumably, is binding in the state where rendered, but not binding in the other states except on the basis of comity. Many noted writers have written on the merits and demerits of the results of the *Haddock case,*[52] thus rendering a complete discussion thereof unnecessary in this comment. Certainly the Supreme Court should clear up the question as to whether jurisdiction for the purpose of divorce is *in rem* or *in personam,* for, if the latter, it seems logical that the court should declare the decree void in the state where rendered. In all likelihood, however, the court will not discard the *in rem* theory because of the strong reasons of public policy behind it, viz., the interest of the state in the marriage

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[50]Atherton v. Atherton, 181 U. S. 162 (1901); see also Dunham v. Dunham, 162 Ill. 589, 44 N. E. 841, 35 L. R. A. 70 (1896); and Hughes v. Hughes, 211 Ky. 799, 278 S. W. 121 (1925).

[51]Pennoyer v. Neff, 95 U. S. 714, 24 L. Ed. 565 (1877).

[52]Ashley, *Conflict of Laws Upon the Subject of Marriage and Divorce* (1906) 15 YALE L. J. 387; Beale, *Constitutional Protection of Decrees for Divorce* (1906) 19 HARV. L. REV. 586; Schofield, *The Doctrine of Haddock v. Haddock* (1906) 1 ILL. L. REV. 219; Peasley, *Ex Parte Divorce* (1915) 28 HARV. L. REV. 457; Richards, *The Full Faith and Credit Clause of the Federal Constitution as Applied to Suits for Divorce* (1920) 15 ILL. L. REV. 259; Fox, *Recognition of Foreign Decrees of Divorce* (1927) 33 W. VA. L. Q.; Walton, *International and Migratory Divorces* (1927) 21 ILL. L. REV. 435; McClintock, *Fault as an Element of Divorce Jurisdiction* (1928) 37 YALE L. J. 564; Parks, *Some Problems in Jurisdiction to Divorce* (1929) 13 MINN. L. REV. 525; Harper, *The Validity of Void Divorces* (1930) 79 U. OF PA. L. REV. 158.

relation. Clearly, under the present law, the husband can acquire a new domicile without justification from the wife; and the wife, it is equally clear, in such case has not subjected her interest in the marriage status to the foreign court. Thus, Professor Beale attempts to justify the *Haddock case* by reading the words "wrongfully abandoned" into it and thus raising the question of *fault,* which he deems to be always a jurisdictional fact.[53]

The basis of this theory is that no state can have divorce jurisdiction unless the absent spouse has by his consent, express or implied, to a separate domicile, or by his misconduct, or by appearance, submitted his interest in the *res* to the state of the new domicile.[54] But this view, however logical, is not based on authority, as is shown by the fact that the *Haddock case* did not overrule the *Atherton case;* furthermore the latter case has been reaffirmed on similar facts.[55] Jurisdictional facts were not even subjected to inquiry in the *Haddock case.* The majority opinion merely assumed that the Connecticut court had jurisdiction to grant a divorce valid in that state.[56] Most of the state courts have, as before stated, continued to give full faith and credit to foreign decrees where it is assumed that the divorce is valid in the state where rendered and not therefore subject to collateral attack on account of some jurisdictional fact,[57] and many of these courts do so without inquiring into the fault of either party as a jurisdictional fact.[58] This theory offers no real solution to the problem, for, as stated before,[59] the jurisdiction of the divorce forum may always be subjected to collateral attack in the latter state by showing that the court in the first state had no jurisdiction. In such suit, the original plaintiff will be given probably as little actual notice as the original defendant was given in the first case; the evidence will be in favor of the original defendant in the second suit just as it was in favor of the original plaintiff in the first suit. Furthermore, the states differ so widely on the question of what constitutes *fault,* and the standards of morals and laws regulating the interest of the state in the marriage *res* differ so widely that it is folly to look for uniformity by adopting the test of *fault* as a jurisdictional fact. In this connection it will be noticed that the principal case stated absence of fault in the wife as one of the grounds for refusing to recognize

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[53]Beale, *Haddock Revisited* (1926) 39 HARV. L. REV. 417. See also Justice Cardoza's opinion in Dean v. Dean, 241 N. Y. 240. *cf.* Sudbury v. Sudbury, 179 Iowa 1039, 162 N. W. 209 (1917); and Rinaldi v. Rinaldi, 94 N. J. Eq. 14, 118 Atl. 685 (1922). In the latter two cases full faith and credit was given where separation was by mutual consent, no fault being attributable to either party.

[54]Edgerly v. Bush, 81 N. Y. 199 (1880).

[55]Thompson v. Thompson, 226 U. S. 551, 33 Sup. Ct. 129, 57 L. Ed. 347 (1913).

[56]Haddock v. Haddock, 201 U. S. 605 (1906).

[57]*Supra,* Notes 2, 3, 4, and 5.

[58]David v. David, 70 Colo. 37, 197 Pac. 241 (1921); Perkins v. Perkins, 225 Mass. 82, 113 N. E. 841, L. R. A. 1917B 1028 (1916); Pridgen v. Pridgen, 203 N. C. 533, 166 S. E. 591 (1932).

[59]*Supra,* Note 23.

the Arkansas decree on the basis of comity. Thus there is little hope for uniformity as long as recognition is left to interstate comity. Also, there is little hope in securing a uniform definition of *fault* considered as a jurisdictional fact, for the United States Supreme Court has evinced no interest in the question and has not even decided a divorce case involving these questions since 1913.[60]

In any event, as long as the *Haddock case* is law, it is clear that (except where the defendant was actually or constructively domiciled at the divorce forum, and with the possible exception of cases where the defendant has acquired a separate domicile elsewhere and the last common domicile was at the divorce forum) the question of recognition of divorces obtained on constructive service rests entirely on principles of interstate comity. In other words, states are not required to give any more effect to divorce decrees of their sister states than they would be required to give a decree rendered in a foreign country. This is true in spite of the fact that it would seem that the very purpose of Article 4, Section 1 of the Constitution was to supersede the requirement of merely such credit as the states might see fit to give on the basis of comity. The present state of the law obviously legalizes polygamy and bastardy. For example, as applied to the principal case, supposing that the husband married again in Arkansas, which recognizes his divorce from his former wife who resides in Mississippi, the question of who was his true wife would depend on the particular state in which the question happened to arise.

Only a few of these complications will be noticed, for to recount fully the disastrous consequences of the *Haddock case* would be but to echo the wailing of Justice Holmes' dissent and the criticisms of numerous other writers on the subject. It is true that the relative differences in liberality of state divorce laws complicate the problem. It is also true that a strict application of the *in rem* theory of divorce jurisdiction often results in unfairness and hardship in respect to the spouse who receives no actual notice of, and therefore has no opportunity to defend, the suit. It is true that the states differ on the question of what constitutes "morality" and on what the "interests of the state" in the marriage *res* should be. Professor Leflar in this journal recently stated that these questions "must be left for each state to decide for itself" and concludes that "there seems no reason for requiring other states which do not feel that they have such interests to discover and protect them."[61] This position, it is submitted, is unsound and unsupported by the weight of authority, whether measured by numbers, historical background, or reason. It is a well settled principle that it is far more desirable that the law should be certain than that justice should be done in each particular controversy. Especially is this true of the law regarding the marriage relation, and it is extremely doubtful whether the so called "modern growth of freedom of women" has altered the truth or fundamental

[60] *Supra*, Note 55.
[61] *Supra*, Note 42.

soundness of this principle in any particular.[62] Since the basis of recognition rests now on principles of interstate comity, it is the duty of the states, it is submitted, to take cognizance of the fact that divorce law in the United States is much too far reaching in its application to justify a state court in looking solely to its own local public policy in considering the question of recognition of foreign divorces. It is not, in the last analysis, a local problem at all, and it is a gross misconception to view the several states as so many foreign countries dealing with the problem. To do so is to lose sight of the fundamental nature of our Federal Union. The Mississippi courts would do well therefore, it is submitted, to fall in line with the majority of state courts which continue to give full faith and credit to foreign divorce decrees, though not required to do so, thus mitigating the evils which the *Haddock case* has rendered possible.

Insofar as the instant case followed strictly the *Haddock case,* the writer believes that it fosters a socially undesirable policy. However, the case is justifiable because, under the facts, the husband's domicile in Arkansas was not *bona fide,* nor did the Arkansas laws even require his residence to be *bona fide.* His residence was only temporary and obtained for the purpose of working a fraud on the wife. In this connection we may note that such a jurisdictional fact did not exist in the *Haddock case.* Therefore the jurisdiction of the Arkansas court was properly subjected to collateral attack on this account.[63] In such a case, the situation is just as if the divorce forum had jurisdiction of neither party. A state such as Arkansas, which assumes to grant divorces under such circumstances, cannot expect recognition of such divorces in other states. This would be true even if the *Haddock case* had compelled recognition of foreign divorces because such recognition would still be subject to their being valid in the state where rendered. The instant case therefore is sound in refusing recognition in such a case.[64]

LON D. HERBERT.

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[62] II BISHOP, MARRIAGE, DIVORCE, AND SEPARATION § 856, says: "For the peace of the world, for the prosperity of its respective communities, for the well-being of its families, for virtue in social life, for good morals, for religion, for everything held dear by the race of man in common, it is necessary that there should be one universal rule whereby to determine whether parties are to be recognized as married or not."

[63] *Supra,* Note 24.

[64] Andrews v. Andrews, 188 U. S. 14 (1903); State v. Cooke, 110 Conn. 348, 148 Atl. 385 (1930); Hood v. State, 56 Ind. 263 (1877); Walker v. Walker, 125 Md. 649, 94 Atl. 346 (1915); State v. Arrington, 25 Minn. 29 (1878); Lister v. Lister, 86 N. J. Eq. 30, 97 Atl. 170 (1915); Fischer v. Fischer, 254 N. Y. 463, 173 N. E. 680 (1930). But see State v. District Court, 66 Mont. 496, 214 Pac. 85, 33 A. L. R. 464 (1923) holding that if the divorce is to be annulled for fraud, this must be done in the state which granted the divorce. Professor Beale in his recent excellent text says that this is the best view. See 1 BEALE, CONFLICT OF LAWS (1935) 476.

RECENT IMPORTANT DECISIONS

TAXATION—POWER OF A STATE TO TAX SHARES OF NATIONAL BANK STOCK HELD BY FEDERAL AGENCY

The Reconstruction Finance Corporation subscribed for the entire issue of preferred stock of the Baltimore Trust Company in order to re-open the bank and to set the business going. Following a provision of the Maryland Code,[1] the State Tax Commission upheld a tax on the shares, overruling the protest of the bank.[2] A writ of certiorari was granted to this court to determine the extent of the power of a state to tax national bank shares held by a federal instrumentality. *Held,* all shares in National banks—no matter by whom owned —shall be subject to taxation. *Baltimore National Bank v. State Tax Commission of Maryland,* ..U. S. .., 80 Law Ed. 388 (1936).

The court in the instant case appears to proceed on the theory that exemption of the Reconstruction Finance Corporation from taxation is dependent on the existence of some provision of federal law immunizing the corporation from taxation. Under the statute in effect today,[3] the legislatures of each state are given the power to determine and direct the taxing of all shares of national banking associations located within their respective limits. Due to the all-inclusive word "all," the United States Supreme Court has refused immunity from such taxation to national banks owning shares of the capital stock of another national bank.[4] The Federal Statute creating the Reconstruction Finance Corporation exempted from taxation, "The corporation, including its franchise, its capital, reserves and surplus, and its income . . . ; except that any real property of the corporation shall be subject to State, Territorial, county, municipal, or local taxation to the same extent according to its value as other real property."[5] Justice Cardoza, in distinguishing these two statutes, said, "An earlier act specific in its coverage will be read as an exception to a later one directed to investments generally."[6] The decision seems to be based on the ground that the Reconstruction Finance Corporation, as an acknowledged governmental agency, is in the same category as are national banking associations—that as national banking associations are liable for such a tax, the corporation is similarly liable, as no specific provision appears in the act creating the Reconstruction Finance Corporation exempting it from such taxation.

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[1] MARYLAND CODE (Supp. 1935) Art. 81, § 15e.

[2] It is a settled practice for banks or corporations to litigate a question of taxability on behalf of the stockholder. Des Moines Nat. Bank v. Fairweather, 263 U. S. 103, 68 Law Ed. 191 (1923).

[3] 12 U. S. C. A. § 548, R. S., § 5219 (1923).

[4] National Bank of Redemption v. Boston, 125 U. S. 60, 31 Law Ed. 689 (1888); Bank of California v. Richardson, 248 U. S. 476, 63 Law Ed. 372 (1919).

[5] 15 U. S. C. A. § 610, 47 Stat. 9, Chap. 8, § 10 (Jan. 1932).

[6] 80 Law Edition 391 (1936).

However, in cases arising in the past, where special corporations have been formed to aid in the performance of governmental functions,[7] the court has taken the view that if the object of the corporation is the furtherance of some federal governmental function, this in itself is sufficient to give immunity as against state taxation. Hence, a specific statutory provision providing for exemption has not been necessary. The act creating the Reconstruction Finance Corporation was entitled "An act to provide emergency financing facilities for financial institutions, to aid in financing agriculture, commerce, and industry, and for other purposes."[8] Should not the purpose for which the Reconstruction Finance Corporation was created be considered as controlling?

In a case arising in the District Court for the Western District of Kentucky,[9] involving a similar controversy and decided prior to the case under discussion, the purpose for which the Reconstruction Finance Corporation was created was considered as controlling. The court said, ". . . Section 610 of the act creating the Reconstruction Finance Corporation expressly provides that none of the property of the corporation, other than its real estate shall be subject to taxation by the United States, or by the States, or any subdivision thereof. Such legislation was not necessary in order to exempt the shares of stock from taxation; but the fact that it was enacted establishes beyond all question that it was the intention of Congress that the property of this corporation other than its real estate, should be exempt from taxation; and that intention of Congress must be respected."[10]

It is clear that if the purpose of the Reconstruction Finance Corporation is a valid purpose which the Federal Government may exercise directly, and if the Federal Government were exercising this purpose in its sovereign name, it would not be subject to any form of state taxation. No question is raised as to whether the activities of the Reconstruction Finance Corporation are governmental or not. It seems to be taken for granted that this is a valid exercise of a governmental function. The decision in the instant case seems to be a clear departure from the former rule that "the states have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government."[11]

The court in effect held that the corporation was not dedicated to the public welfare. Is this true? All the stock of the corporation is held by the United States; the corporation is to exist for only a specified time; all monies for carrying out its purposes are obtained through appropriations by Congress; at specified times, reports are made to Congress as to the progress

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[7]King County, Wash. v. United States Shipping Board Emergency Fleet Corporation, 282 Federal 950 (1922); Clallam County v. United States, 263 U. S. 341, 68 Law Ed. 328 (1923); United States Spruce Production Corporation v. Lincoln County et al., 285 Federal 388 (1922).

[8]15 U. S. C. A., § 601, 47 Stat. 9, Chap. 8, § 10 (Jan. 1932).

[9]United States v. Lewis, 10 Federal Supp. 471 (1935).

[10]*Idem.* at 474.

[11]United States v. Baltimore & O. R. Co., 17 Wall. 322, 21 Law Ed. 579 (1873); Railroad Co. v. Peniston, 18 Wall. 5, 21 Law Ed. 787 (1873); Van Brocklin v. Tennessee, 117 U. S. 156, 29 Law Ed. 845 (1886); Indian Motorcycle Co. v. U. S. 283 U. S. 570, 75 Law Ed. 1277 (1931); U. S. v. Wright, 53 Fed. (2) 300 (1931); Schlosser v. Welsh, 5 Fed. Supp. 993 (1934).

of its activities. The sole purpose of the corporation is dedicated to the general welfare of the nation as a whole. Should the mere fact that the United States may eventually receive a profit from the aid granted, place the Reconstruction Finance Corporation in the same position as a private person holding stock in a national bank as an investment for private gain? I think not.

In such case, should the immunity usually granted ot federal agencies be destroyed by the fact that the Federal Government is functioning through a corporate agency, especially where the entire stock of such agency is owned by the Federal Government, and the functions of the corporation are exclusively those of the Federal Government?

"The exemption of agencies of the federal government from taxation by the states is dependent, not upon the nature of the agents, nor upon the mode of their constitution, nor upon the fact that they are agents, but upon the effect of the tax; that is, upon the question whether the tax does in truth deprive them of power to serve the government as they were intended to serve it, or hinder the efficient exercise of that power."[12] Certainly in the instant case, this tax subjects the corporation to an assessment of part of its capital intended to be used in the exercise of its powers for which it was created.[13]

M. HARPER.

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[12]Railroad Co. v. Peniston, 18 Wall. 5, 21 Law Ed. 787 (1873).

[13]During the Seventy-Fourth Congress, a law was enacted, exempting such stock held by the Reconstruction Finance Corporation from any and all taxation.

BOOK REVIEWS

NEUTRALITY: ITS HISTORY, ECONOMICS AND LAW: VOL. I, THE ORIGINS — By Philip C. Jessup and Francis Deák. Columbia University Press, New York, 1935. Pp. xvii, 294. $3.75.

VOL. II, THE NAPOLEONIC PERIOD—By W. Alison Phillips and Arthur H. Reede. Columbia University Press, New York, 1936. Pp. ix, 339. $3.75.

VOL. III, THE WORLD WAR PERIOD—By Edgar Turlington. Columbia University Press, New York, 1936. Pp. xvii, 267. $3.75.

VOL. IV, TODAY AND TOMORROW—By Philip C. Jessup. Columbia University Press, New York, 1936. Pp. viii, 237. $2.75.

During the past several years articles and books upon the subject of neutrality have been appearing with increasing frequency. The most diverse points of view have been presented, ranging from the flat assertion that neutrality is dead—a thing of the past—to the equally strong assertion that attempts to abolish neutrality, such as the creation of the League of Nations and the adoption of the Paris Peace Pact renouncing war, have miserably failed.

The recently aroused interest of the people of the United States in neutrality may no doubt be largely attributed to the Italo-Ethiopian war, which not only obliged the government to take a definite stand toward the belligerents but also to determine what its attitude should be toward the sanctions proposed by the League of Nations. The current confusion and conflicting opinions on the subject were reflected in Congress where a makeshift neutrality policy was adopted on August 31, 1935. This past January disclosures before a Senatorial investigating committee unexpectedly revealed glaring defects in the United States neutrality policy from 1914-1917. This emphasized more than ever the need for remedying the admitted defects of the August law, but no agreement could be reached. The provisions of that law have therefore been re-enacted and the United States is still without a permanent neutrality policy.

It was with the hope of assisting in the solution of the neutrality problem that these four volumes were prepared. In his preface to Volume I Professor Jessup writes that "These studies seek to give a clearer understanding of the fundamentals upon which the law of neutral rights and duties has been based and of the factors—largely economic—which have conditioned its development." (p. vii) In the final volume he has undertaken "to draw all the threads together," and, from the lessons of the past, make suggestions for a permanent neutrality policy for the United States.

The volumes have been prepared under propitious circumstances. They are the outcome of a project planned and directed by a committee of the faculty of Columbia University of which Professor Jessup was chairman. Researches were conducted under the auspices of the Columbia University Council for Research in the Social Sciences and were financed by grant of funds from the Laura Spelman Rockefeller Memorial. With the exception of

Volume I, however, which is the joint work of Professors Jessup and Deák, each contribution is the work of one man who alone is responsible for the views expressed. On the whole this may be commended, for when several periods of history are involved it is obviously impossible for one individual to investigate the whole field thoroughly. In fact, even with the division of labor as made in the present series there is no pretense that the field has been exhausted. A minor advantage of work so divided is that an unconscious bias of one author may tend to counteract that of another, thus giving the reader a more impartial view of the whole field.

Volume I, THE ORIGINS, is the work of Professors Philip C. Jessup and Francis Deák of Columbia University. In the preface they state the plan of the book to be as follows: Chapters I and II present the background for the development of neutrality, Chapters III through V trace particular substantive rules, Chapters VI through VII trace the contemporaneous growth of procedural law and Chapter VIII deals with the law of neutral duties. A final chapter is in the nature of a summary and presents certain conclusions. With some changes four of these chapters—Enemy Property, Contraband of War, Procedural Law at Sea, and Early Prize Court Procedure—are reprints of articles which have appeared in the Political Science Quarterly, The Tulane Law Review, and the University of Pennsylvania Law Review.

The book appears to be based upon a great amount of research, for each chapter is well documented. There is a valuable bibliography of some five pages containing the titles of books and articles which the authors found especially useful. A list of treaties of the principal maritime states important in tracing the development of neutrality is also given, grouped according to states and arranged chronologically within each group. The language in which each treaty is printed is indicated. Finally, there is a table of some 150 cases to which the authors have referred in the text or in the footnotes. The date and the country in which the case was decided is indicated.

The period covered in this volume extends from the earliest beginnings of neutrality up to the middle of the 18th century. It is of interest to note that the word "neutrality" is used in its modern sense as early as the 14th century although the concept was not generally familiar until the middle of the 17th century, and even then neutrality as a legal status was ill defined, especially as regards neutral duties. In tracing the emergence of neutrality the authors discuss the influence upon it of certain factors which either retarded or stimulated its development. Among these are feudalism, the church, the increased maritime commerce of the 15th and 16th centuries, the notion of "just" and "unjust" war, the influence of merchants, and the development of standing navies.

Undoubtedly a major contribution of this volume is the careful examination and analysis of early treaties which are significant in tracing the development of the modern notion of neutrality and which, in many instances, foreshadow or originate the later rules concerning neutral rights and duties. Such a discussion must necessarily be detailed and somewhat technical, but the authors have endeavored to assist the reader by the use of appropriate subheadings within the chapters, and usually a conclusion or summary has been added at the end of each sub-division. Thus, in the rather lengthy chapter on Contraband of War a chronological division is made, with a discussion of the development (1) in the 16th century, (2) in the 17th century and (3)

during the first half of the 18th century. Each subdivision ends with a conclusion, the final conclusions being based on the entire chapter. It may be noted that the authors expressly recognize that they have not covered the development of neutrality in all its phases for this period, since their chapters on substantive law are limited to a discussion of Contraband of War, Blockade, and Enemy Property. These are intended to be illustrative of further studies which should be made.

To the reviewer the chapters on Procedural Law at Sea and Early Prize Court Procedure were the most interesting. The early procedure in visit and search, the nature of ship's papers used, the fraudulent practices employed, and the use of passports and certificates issued by neutral governments invite comparisons with modern practices. So too, the chapter on Early Prize Court Procedure, even though of an admitted fragmentary character, furnishes an interesting background for a study of the prize courts of the World War period and the manner in which they functioned. The chapter opens with a quotation from a British memorandum of 1916 to the effect that the practice and procedure adopted in prize courts "are not settled or regulated by international law, but they are determined by each nation for itself." (p. 201) The fallacy of this statement, especially for the English prize courts, is clearly brought out as the development of prize courts is traced. We find that the machinery for adjudication of prize cases dates back to the 14th century.

The procedure in obtaining and evaluating the evidence in prize cases has an important bearing upon the actual extent of neutral rights, as the authors clearly point out. The statement is made that the British attitude toward the rule that the determination of a ship's fate shall be "out of her own mouth" was less rigid than the continental view, both in principle and practice, long before the British government sought to discard the rule in 1916 on the plea of changed conditions. The widespread use of presumptions, that is, "legal rules which took the place of actual evidence," thus enabling the captor to escape the rule which required him to judge the ship out of her own mouth, is especially found in the British courts. The authors divide presumptions into two main classes—statutory and judicial presumptions, while the latter are again divided into intrinsic and extrinsic presumptions. It is stated that presumptions present a complicated problem and the reviewer agrees with this statement. Whether a given presumption has become or may, on occasion, be considered conclusive in the sense of establishing new rules of substantive law, or whether it is rebuttable, is apparently a puzzling question with respect to statutory presumptions, and, if one looks to the facts instead of to the theory, it appears to be even more puzzling with respect to judicial presumptions. Reading the authors' discussion of presumptions left the reviewer with an unhappy feeling of confusion, uncertain whether to blame the authors, or the presumptions, or the prize courts, or perchance himself! The point is clear, however, that the use of presumptions was always to the disadvantage of the neutral claimant and in some cases made possible a disregard of neutral rights.

The concluding chapter attempts to summarize and emphasize some of the principal points enlarged upon in the preceding chapters and at the same time serve as an introduction to Volume II of the series. Two questions are posed, (1) What commercial enterprises could neutrals carry on during war and

(2) To what extent were belligerents hampered in attacking the trade of their enemies? In answering question one "it is necessary to say that there was practically no commerce which neutrals could carry on in time of war with complete assurance of freedom from belligerent interference. It is necessary to add that there was no commerce which neutrals did not carry on, or attempt to carry on, despite belligerent interference." (pp. 264-65.) In answering the second question there is some recapitulation of the substantive and procedural rules whose development had been discussed in the preceding chapters.

The authors emphasize the point of view expressed in the preface, namely, that the interests of neutrals and belligerents are essentially irreconcilable and that the problem of neutrality has always been and still is, "a compromise between these irreconcilable interests." The pendulum swings this way and that, depending upon the bargaining power of the particular state. Thus, in examining the development of rules concerning contraband of war consistency was found only in so far as the national, economic and political self-interest remained constant. For the period covered, the authors were of the opinion that belligerents seemed to have secured little, if any, better bargain than neutrals.

In anticipation of Volume IV certain lessons are drawn from this study for application to the present day. "All this indicates the highly artificial and unreal nature of that body of illogical compromises known as the international law of neutral and belligerent rights at sea." (p. 268.) The issue (the method and manner of belligerent endeavor to control neutral trade) during the World War, precisely as in the 16th and 17th centuries, "was argued and decided, not on the basis of what was assumed to be law . . . but on the basis of hard facts presented by existing economic conditions, strategic necessities . . . and political exigencies." The problem still exists, "its solution may be expected only when governments and their spokesmen, especially the 'experts' and technicians, are willing to appraise the experience of the past in a realistic spirit, and to agree upon rules of conduct which will be based less upon logic and theory than upon the real 'life of the law.'" (p. 270.)

Volume II. THE NAPOLEONIC PERIOD. This volume is divided into two parts. In Part One, Professor W. Alison Phillips, a distinguished historian and for the past twenty-two years Lecky Professor of Modern History in the University of Dublin, sets out to analyze the conflict between belligerents and neutrals during the period of the French Revolutionary and the Napoleonic Wars. In Part Two, Mr. Arthur H. Reede, instructor in economics at Pennsylvania State College, supplements the work of Professor Phillips by making "An economic analysis of the effects of this conflict upon the neutral nations."

As for the mechanical structure of the book, there is a short Preface, written by Professor Jessup, which serves to link this volume with the preceding one. Part One comprises slightly more than 200 pages of the text and Part Two over 90 pages. There is a bibliography of some five pages, in which is listed "Published and Unpublished Source Material" for the period, "Contemporary Works," "General Works," and "Additional Economic and Statistical Works and Materials." Most of the latter are in foreign languages,

German predominating. An Appendices of some sixteen pages contains tables of exports and imports of the principal neutral countries and city states during this period, tables with respect to shipping at Bremen, and certain translations by Professor Phillips of documents bearing upon the trade conditions at Hamburg and Danzig.

Professor Jessup writes in the Preface that the first volume "revealed the perhaps surprising vitality of neutrality as a legal institution," and that in the period here treated it was to receive one of its most vigorous tests. Although this period has been covered in part in other works, the advisability of further research is readily admitted. No period has furnished such a wealth of material for a study of this type. This volume is not complete, yet it is more so than any other study that has recently appeared.

Professor Phillips' past achievements undoubtedly qualify him for covering the period from 1793-1815. He treats it chronologically, following the traditional method of the historian: "The Opening Moves of the Economic War," "Jay's Treaty," "The Neutral Northern Powers and the Belligerents," "Renewed Tension Between the United States and Great Britain," "The Continental System," "The United States and the Belligerents, 1805-1812." In these six chapters the author is remarkably successful in presenting a wealth of detail in an effective and interesting manner. This is in part due to his arrangement of material and in part to his vigorous, expressive style. The thoroughness of Professor Phillips' research is indicated by the numerous footnotes which document and support the text.

The reviewer found it a pleasant task to read Professor Phillips' contribution. However, there seemed to be a strong pro-British point of view throughout the work, no doubt reflecting an unconscious bias of the author. It is hard to put one's finger upon any particular passage as illustrative of this bias; it seems to be rather in the strength of the adjectives used to applaud or condone a person or an event. Thus, when Monroe was sent to France he was favorable to the French, as was also the party which he represented in this country. Professor Phillips calls him the "rough Virginian who shared his compatriot Jefferson's hatred of England and admiration for republican France." (p. 55.) When Monroe was Secretary of State under Madison he writes: "James Monroe . . . was favorable to a good understanding with England." (p. 196.) Again, he seems to take pains to point out that the British were not the first to violate certain accepted doctrines of international law, but that they followed the French as a matter of necessity.

Professor Phillips' vigorous use of adjectives may be further illustrated by the following: "monstrous folly of the French National Assembly," (p. 44) "deep sense of grievance," (p. 46) "theatrical performance" of Monroe in Paris (p. 55). We find also the expression "James Madison ruled in his stead" (p. 184) in referring to the fact that Madison had succeeded Jefferson as president. As a final criticism it is suggested that the author would have lessened the reader's burden if he had given the year more often when he referred to dates.

Apart from these minor criticisms the reviewer has only praise for Professor Phillips' work. A just evaluation of the vast number of sources referred to would be difficult, but it is a scholarly presentation.

Mr. Reede, in Part Two, "The Effects of the Wars Upon Neutral Commerce and Industry," undertakes "to examine somewhat more closely than hitherto has been done, the nature of the adverse effects to which neutral commerce and industry were subjected by the belligerents," (p. 215) as well as any beneficial effects which may have resulted. In his introductory chapter he explains the difficulty confronting such a study—mainly that the statistical materials were scanty and seldom in a suitable form.

The author, in three chapters, attempts to trace the effects of the French Revolutionary and Napoleonic Wars upon the United States, the Scandinavian States, and Germany. In each of these three chapters there are numerous tables and figures presenting trade statistics of the various countries. This work is probably of more value as a reference book than for interesting reading. Yet the author makes an analysis of the tables and figures and reaches certain conclusions as to the effect of the wars upon neutral commerce. Among some of the effects mentioned, for example, are: the ports of the West Indies were opened to neutral vessels; the bulk of American trade was diverted to American bottoms; the United States prospered during most of the years 1793-1811; "In all the neutral areas, with the exception of Sweden, the period of neutrality witnessed considerable increases in trade." (p. 301.)

Did the accessions to trade counterbalance the losses incident to the inconvenience? Mr. Reede's answer to this question is inconclusive. However, he considers it probable that in shipping and ship building, and in the industries concerned in the furnishing of grain and naval stores, the profits offset and perhaps overbalanced the losses. Over-expansion took place in some lines, while other industries were retarded. However, there was no lasting change in economic conditions and relationships.

Mr. Reede appears to have a clear understanding of the difficulties involved in coming to any definite conclusion and therefore guards against being too absolute in his statements. His contribution aids in an understanding of the materials presented by Mr. Turlington in Volume III.

Volume III. THE WORLD WAR PERIOD. In the preface to this volume Professor Jessup fills in the gap which exists between the periods covered in this and the preceding volume. His brief explanation acquaints the reader with the development of the law of neutrality from 1815 to 1914. One wonders why an entire volume was not devoted to these years, or at least to the United States Civil War period. Professor Jessup refers to the Declaration of Paris, the United States Civil War, the Hague Peace Conferences and the London Naval Conference, as an introduction to the work of the author of Volume III. He also gives a summary of the law of neutrality as it was understood by the international lawyer in 1914.

As for the mechanical structure of Volume III, there are some six chapters; also there is a selected bibliography listing works treating of "Belligerent Measures and Their Economic Consequences in General," and works limited to a study of various aspects of the war in Denmark, The Netherlands, Norway, Sweden, Switzerland, the United States, and a number of other countries. An extensive Appendices of nearly 100 pages contains the "British Contraband Lists," the "Rationing Agreement Between the United States and Norway of April 30, 1918," a "Report on Post-War Settlements of Swedish,

Norwegian, Danish, and Dutch Prize Cases," as well as a large number of tables, most of which were prepared by research assistants. Thus, there are tables on British and French Prize Courts with reference to the ships and cargoes which came before them; tables showing the size and movements of neutral commercial fleets; and statistical reports, containing tables, on "Neutral Shipping Losses During the World War," and "Marine War Risk Insurance, Shipping Profits, Freights and Shipbuilding Costs During the World War." A number of tables are also included in the text where they are analyzed. This occasionally results in dry reading. However, the vast amount of statistical material in this book undoubtedly enhances its value, especially since it is mainly a treatment of the economic phases of the World War. Numerous references in the text to tables in the Appendices are slightly confusing to the reader. Once or twice there is a faulty reference, for instance on page 115 reference is made to Appendix IV whereas the author apparently means Appendix V. The same mistake appears on page 123.

Mr. Turlington, a former Rhodes scholar and sometime counsel in the State Department, is the author of Volume III. He sets it out as his purpose to devote particular attention to the economic consequences of belligerent interference with neutral rights during the World War period. In a short introductory chapter reference is made to the changed concepts of blockade and contraband. The author then sets for himself the task of attempting "to isolate the immediate economic consequences of each of the individual measures of belligerent interference on which sufficient data are available," in order that he may draw up "a tentative summary of profits and losses" (p. 7) of the principal neutral countries. In some four chapters treating as many different phases of the economic problems involved the author attempts to isolate these immediate consequences. With respect to the first problem, neutral losses through measures relating to contraband of war, each country's losses are estimated separately and a table gives the sum total of such losses. For the second problem, neutral losses through blockades and analagous measures, including mines and submarines, the author could make only an approximation, based on the value of the vessels and cargoes lost, and damages due to deviation, delays, and suspension of sailings through fear of destruction or delay. With regard to neutral losses through interferences by sovereign right (export and import embargoes, bunker control, restrictions on trading with the enemy, black lists, financial blockade, interference with communications of neutrals, and requisition of neutral tonnage) the writer found it impossible to estimate neutral losses. He does conclude, however, that they were heavy and practically placed the neutrals at the mercy of the belligerents.

The fifth chapter is a study of the offsets and mitigations of neutral losses in which each of the principal neutrals are treated separately. There were offsets from state insurance in some neutral countries, from private insurance in others, and from trade agreements between belligerents and private concerns set up in neutral countries. Because of these offsets the author finds that certain groups prospered in spite of losses. However, the consumers and the non-trading classes in neutral countries suffered throughout the war.

In the brief concluding chapter there is an effort to present the "final effects on neutral interests of all the belligerent interferencs with neutral

commerce." Short summaries are given of the losses sustained through belligerent measures relating to contraband of war, blockades and analagous measures, and belligerent interference by sovereign right. Although the total effect of belligerent interference by sovereign right can not be isolated from other forms of belligerent interference, "On the whole, it seems safe to say that belligerent interferences by sovereign right were far more prejudicial to the economic life of the neutrals in the World War than were all the other forms of belligerent interference." (p. 151.)

No attempt was made to follow the fever of war-time prosperity in the neutral countries into the post-war decline, but Mr. Turlington ventures the following remark: "A general war of great magnitude brings in its train a series of economic and financial dislocations so injurious to the world as a whole that no amount of neutral prosperity suffices to offset them." (p. 152.) Perhaps a study of the post-war decline would present a still more complete picture of the effects of war upon neutrals.

Volume IV. TODAY AND TOMORROW. The groundwork having been prepared in the preceding three volumes, Professor Jessup now undertakes to analyze the problem of neutrality in the light of past experience and ventures to make certain suggestions for its solution. He repeatedly emphasizes the thesis of Volume I—that the law of neutrality is based on compromise, and that "nothing could be more fallacious than the attempt to test the application of any one of these rules of neutrality by the principles of logic." Thus relieved of fitting the facts which he finds into a logical strait-jacket, the author proceeds to draw lessons from the historical development of neutrality in the chapters entitled "Neutrality: A Euphemism for Economic War" and "No New Thing Under the Sun."

In the first of these chapters he stresses the prominence of the economic motive in the development of the laws of neutrality, and believes that the belligerent has the advantage under these laws as they have developed. In his opinion neutrals struggle for an illusory goal if the situation be viewed from a national, not from an individual outlook. He approves Professor Turlington's view, expressed in Volume III, that indirect belligerent interferences, as through the exercise of sovereign right, are probably much more damaging to neutral interests than are direct interferences, yet they are precisely the forms of belligerent pressure which can not be met by neutral protests.

In the chapter "No New Thing Under the Sun" Professor Jessup refers to an essay of Judge John Bassett Moore's which warned against the idea that "changed conditions" are a justifiable excuse for belligerent violations of neutral rights. Professor Jessup elaborates on this point in an interesting and convincing fashion. In answer to the argument that a new situation exists because in modern days whole populations are armed and the feeding of civilians has therefore become a war problem, the author presents in parallel columns selected paragraphs from the official communications of the British Government to the Government of the United States in 1793 and in 1915. Similarly, he points out that the British argument during the World War that contraband lists must be extended because of "new conditions" has been used by belligerents as long as there has been a law of contraband. Like-

wise, the argument that new rules of visit and search were justified in the World War because ship's papers could not be depended upon ignores the fact that the carriage of fraudulent or duplicate papers was practiced during the wars of the 17th century. Even the feeling that the World War was a "new" type of war has a precedent in the French Revolutionary and Napoleonic Wars. In developing this chapter Professor Jessup again asserts his underlying thesis in the statement that "Both the strength and the weakness of the international law of neutral and belligerent rights at sea have stemmed from the original basis of compromise. It has been a strength because it took account of the reality of the irreconcilable interests of neutrals and belligerents. It has been a weakness because it gave satisfaction to neither party." (p. 62.)

In the chapter "Is Neutrality Dead?" Professor Jessup examines the effect of the League of Nations on neutrality. He discusses the pertinent articles of the League Covenant and the manner in which they have been interpreted and applied. In 1920 the Council of the League declared that neutrality was incompatible with League principles, but the development has been otherwise, as Professor Jessup indicates, and today the League itself recognizes that some of its members may remain neutral. As to whether a signatory of the Paris Peace Pact can remain neutral if another signatory resorts to war in violation of the pact, Professor Jessup points out that a nation may ignore a treaty breach if it chooses to do so. He concludes that neutrality is not dead.

In the next chapter "The Abandonment of Traditional Neutrality" the author makes a critical analysis of the United States Neutrality Act of August 31, 1935, which he calls "a hodgepodge of ideas scrambled together in the legislative frying-pan in the closing days of a hot summer session in Washington." (p. 124.) He then examines critically other plans for keeping the United States out of war, such as resort to a complete nonintercourse program, authorization to the President to lay embargoes on contraband of war or essential raw material, a "cash and carry" plan whereby Americans would be forbidden to carry goods to either belligerent, but they would be obliged "to come and get it" at our ports and pay cash for their purchases, and the establishment of quotas for the belligerents themselves. In his opinion none of these plans measure up to the requirements of a satisfactory neutrality policy. In reply to the question, Should the United States join the collective system, i. e., the League of Nations, Professor Jessup remarks that this course does not appear to be acceptable at the present time to the majority of the people in the United States. He suggests, however, that we should not consider our participation in the League as a short-cut to the millenium since the development of international co-operation and organization will always be a slow process. To illustrate the latter point he quotes, for the second time, a favorite proverb of Elihu Root's, "Leg over leg the dog went to Dover."

In the chapter on "The Revision of Neutrality" Professor Jessup presents his solution of the neutrality problem. Seeking to learn from the lessons of the past, he concludes that neutrals must co-operate if they would keep out of war. He sees in the ratification of the Argentine Anti-War Pact of 1933 by the United States an indication of the practicability of this suggestion, since in Article 3 the contracting parties agree that "they will adopt in their character as neutrals a common and solidary attitude." However, in Professor

Jessup's opinion, the mere willingness to co-operate is not enough; neutrals must also be willing to forego large profits if their neutrality policy is to succeed. Otherwise, the irreconcilable conflict between neutral and belligerent interests will very likely lead them into the war. The author believes that neutrals will be willing to make some sacrifices for the sake of neutrality in order to avoid the huge losses attending a state of war.

Professor Jessup does not suggest neutral co-operation in the form of armed resistance to belligerent encroachments on neutral rights, but advocates the use of economic means, such as an agreement as to the extent of neutral trade with which belligerents were not to interfere, embargoes on the export of arms, ammunition and implements of war to the belligerents, embargoes on the exports of certain raw materials essential to the conduct of war, embargoes on loans and credit, and similar measures designed to shorten the war and limit its extent. As for the sort of neutral organization which will be necessary to make any such co-operation effective, he suggests the League of Nations "if the members are always unanimous in applying sanctions against an identified aggressor," with the co-operation of neutral non-member states, otherwise it may be necessary to create an *ad hoc* neutral organization.

This is the least convincing of Professor Jessup's chapters, for although he outlines a solution for the problem of neutrality, he realizes that he can not predict the precise steps which states will take if they adopt his solution. Indeed, there is no cut and dried procedure which must be followed. Therefore, in order to anticipate probable state action, the author discusses critically numerous procedures which might be adopted. This makes the solution itself assume a shadowy and theoretical character in spite of Professor Jessup's struggle to be realistic.

The reviewer agrees with the view that neutral co-operation is necessary to an effective neutrality policy, that is, one which will keep the neutral state out of war, and will limit the scope and duration of the war. He would like for the United States to work out a policy in line with Professor Jessup's suggestions. But are the states of the world and, in particular, the United States ready to adopt such a solution? The reviewer would like to think so, but he is not convinced. He recalls Professor Jessup's statement that states have not come to a full realization of the essential solidarity of the interest of neutrals (p. 179), and his account of the apparent indifference of the United States to suggestions for neutral co-operation during the World War. However, it is reported that during the January hearings on the neutrality legislation then pending, Secretary Hull said that the United States intends to "urge other nations to join us at the earliest opportunity in re-examining, re-stating and revitalizing neutral rights under international law as they existed prior to the World War, as nearly as we find it consistent, and as other nations find it consistent, to do so."[1] This indicates that there is at least reason to hope that a forward step will be taken.

In conclusion it may be said that these four volumes are a distinct contribution to a better understanding of the complex and intricate problem of

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[1]New York Times, April 12, 1936, Section 1, p. 32.

neutrality. The attempt to profit from the experience of the past is one of the notable features of this series. It is to be hoped that such studies will point the way to the adoption by the United States of an effective neutrality policy.

JAMES J. LENOIR*

LUCIUS Q. C. LAMAR, SECESSION AND REUNION, by Wirt Armstead Cate. 594 pp. Chapel Hill: The University of North Carolina Press. $5.00.

This work has twenty chapters and attempts to give the life of Mr. Lamar from childhood to his death, prefaced by the history of the distinguished Lamar family. It is more in the nature of a tribute from the writer to his hero. He raises some doubt as to whether Mr. Lamar was ever able to overcome loyalty to his section, notwithstanding the fact that his loyalty to the reunited country and his overcoming sectional allegiance was evidenced by his eulogy on Sumner and by other acts of loyalty. To a student of history it is not necessary to state that the family of Lamar was distinguished in America and abroad. Mr. Cate makes of him the rare combination of mathematician and lawyer. The writer gives Mr. Lamar's controversies and his spirited debates without indicating that his hero was of the swashbuckling type. He represents him as a man who resented oppression and unfairness, especially toward the weak. This is illustrated by his acts toward the cattle barons of the West, and by his reclaiming for the United States, as Secretary of the Interior, 45,000,000 acres of land. He was the first of the southerners to bring to the attention of the arrogant northern coterie the fact that they had antagonists who could represent the people and become more than a match for any of them.

It is rather a difficult task for one to make a character live in the pages of a biography, but the instances Mr. Cate gives of Mr. Lamar's life are a great contribution toward making him walk through the pages of the work. He knew how to arouse the people to oppose oppression without using the arts of a demagogue. He made no attempt to be oratorical, but the expression of his thoughts and feelings in simple language made him eloquent. He was not to be called an office seeker. It would be more accurate to say that the place needed him and that he was better known than the office which he held.

Mr. Lamar was known as a southerner, but the north admired and respected him, and it is doubtful if his courage on the field of battle equalled that which he displayed during the reconstruction period in maintaining the type of southern civilization which he typified and which still holds over.

Some critics have said that Mr. Cate over-emphasized certain things and instances and exaggerated Mr. Lamar's attainments and successes. He may have done so, but it is a rather difficult task to exaggerate his achievements. Mr. Lamar impressed every occasion and every situation in which he appeared.

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*Assistant Professor of Political Science and Law, University of Mississippi.

Mr. Cate represents him as the type of man that people delighted to know and to associate with. He probably makes the mistake of not admitting any error in anything Lamar said or did. He comments with an admiration of Mr. Lamar which his writings exalted and enlarged.

"It has been said of Mr. Lamar that while his mind was judicial and philosophical, his talents were critical rather than creative, and his name is not connected with any important cases, excepting that of *In re Neagle.*"

The courage exhibited in his encounter with Conkling was not as great as that which he exhibited in his defense of Jeff Davis. In the case of Jefferson Davis, except in the south, he was condemned as a traitor.

Mr. Cate might have alluded more specifically to the almost constant friction which Mr. Lamar had with a few men in authority during the reconstruction era.

Mississippians will appreciate Mr. Cate's biographical eulogy of a statesman whom they admired, as does Mr. Cate.

In spite of its interest one is rather impressed with the feeling that the book is a collection of instances. Perhaps, after all, that is the best kind of a biography for it gives the reader an opportunity to form his own opinion with regard to the instances and incidents in which Lamar participated, instead of having them fed to him through the opinion of the biographer. One critic heads his criticism "Old-Fashioned Statesman." This title is appropriate if it is old-fashioned to know the theory of government, its practices, and how to improve it. There is rather a contrast in the Senate of that day and the one of today. At that time people discussed rights and duties of the citizens and the powers of the national and state government instead of constantly grinding on capitalistic and financial affairs.

Mr. Cate cites numerous newspapers which he has selected to add to his eulogy. He most frequently alludes to the incidents showing that the opposing press changed their minds and accepted Lamar's leadership and thought. A few quotations from the antagonistic press might have added more to the heroic figure of his subject. The author gives a fine picture of a patriot, a teacher, a lawyer, a Senator, Secretary of the Interior in Cleveland's cabinet, and a member of the Supreme Court.

Mississippians remember Lamar mostly for his defiance of would-be oppressors, his eulogy of Sumner, his denunciation of Conkling, his refusal to abide by the instruction of the Mississippi legislature, and his part in the restoration of the dignity of Mississippi. It is good to have him brought back as a man worthy of emulation in public affairs.

Lamar added a respectability to Mississippi at a time when great men adorned the Senate of the United States. The citizens of Mississippi filled with pride over the fact that their senator took second place to none.

The suggestion of the "old-fashioned" statesman and other events in the book brings to mind the question: "Is this generation as great as Lamar's?" The answer should be in the negative. It might have been if it had dared as much, suffered as much, accomplished as much. Mr. Cate's presentation of

this picture naturally suggests this comparison. One critic states that he is provincial. A reading of the book will give the answer.

He had an eye to the democratic without being a demagogue; he was a politician without playing politics; he had followers without seeking them; and his followers felt a pride in their following. These are the thoughts of Mr. Cate as he presents them. This work exhibits Mr. Cate as a high type raconteur.

WM. HEMINGWAY*

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*Professor of Law, University of Mississippi.